In the Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1215

GENE BALL,
Petitioner

versus

BOARD OF TRUSTEES OF THE KERRVILLE INDEPENDENT SCHOOL DISTRICT, HENRY H. WIED, MARGARET WATSON, DAN W. BACON, PAT BRADEN, EARL A. COCHRANE, MAURICE HAUFLER AND C. H. BORCHERS, MEMBERS OF THE BOARD OF TRUSTEES, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,
Respondents

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

The petitioner, Gene Ball, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in this case.

OPINIONS BELOW

The unpublished opinion of the United States Court of Appeals rendered on November 20, 1978, appears in Appendix A to this petition at pages A-1 through A-12.

The judgment rendered by the United States Court of Appeals on November 20, 1978 appears in Appendix A at page A-11.

The Order of the United States Court of Appeals rendered on December 20, 1978, denying petitioner's motions for rehearing and rehearing en banc appears in Appendix A at page A-10 .

The Order of the United States District Court dated November 19, 1976 denying [Petitioner's] Petition For Reinstatement and For Leave to File a Third Amended Complaint [from which this appeal was taken] appears in Appendix B at page A-13 and A-14 .

In Appendix C, to show the background of the case from which the U.S. District Court's Order of November 19, 1976 evolved, are reproduced in chronological order the earlier orders of this Court and lower federal courts in this case as follows:

1. The Order of the U. S. District Court denying temporary injunction on March 23, 1979 appears in Appendix C at page A-15 .

2. The Order to show cause issued by the U. S. District Court on May 13, 1970 appears in Appendix C at pages A-16 , A-17 and A-18 .

3. The Order of Dismissal entered by the U. S. District Court on June 5, 1970 appears in Appendix C at pages A-19 and A-20 .

4. The opinion of the United States Court of Appeals rendered on December 17, 1970, reported in 434 F 2d 1040 and withdrawn on Motion for Rehearing on May 4, 1971, appears in Appendix

C at page A-21 .

5. The judgment rendered on Rehearing by the United States Court of Appeals on May 4, 1971, reported in 442 F 2d 408, without written opinion appears in Appendix C at page A-22 . The Order of the United States Court of Appeals accompanying said judgment denying (the Court having been polled by one of its members) petition for rehearing en banc appears at page A-22 .

6. The denial by this Court (Mr. Justice Douglas having been of the opinion that certiorari should have been granted) on October 12, 1971, reported in 404 U.S. 865, petitioner's application for Writ of Certiorari appears in Appendix C at page A-24 .

7. The Order issued by the United States District Court on February 18, 1972 denying petitioner's application for reinstatement of his Section 1983 action to inactive status on the docket of the district court appears in Appendix C at page A-25 .

8. The Order issued by the U.S. District Court on February 23, 1972 denying petitioner's motions for leave to file petition for reinstatement and Second Amended Complaint [because deemed premature prior to further appeal in state administrative proceeding] appears in Appendix C at page A-27, A-28.

JURISDICTION

1. The Jurisdiction of this Court is invoked under 28 U.S.C. A. Section 1254

   (1) which provides:

   > "Cases in the courts of Appeals may be reviewed by the Supreme Court by the Following methods: "(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;"

2. The judgment of the United States Court of Appeals for the Fifth Circuit was entered on November 20, 1978. A timely motion for rehearing was denied on December 20, 1978.

QUESTIONS PRESENTED

Gene Ball, petitioner, an untenured math teacher, under contract to teach during the 1969-70 school year at the Tivy High School in Kerrville, Texas, was discharged on September 3, 1969 as a result of his refusal to shave a van-dyke beard he had cultivated during the summer. He successfully challenged his discharge before state administrative bodies, receiving favorable decision from the Texas State Board of Education on January 5, 1970. Eight days after respondents filed appeal in state district court from the administrative order in petitioner's favor, petitioner filed suit under 42 U.S.C.A.

Section 1983 in United States District Court seeking reinstatement, back pay and damages. When advised by the United States District Court that *he could pursue his Section 1983 action in federal court only after disposition of respondents pending appeal in state court* from the administrative order, petitioner sought to hasten matters by abandoning the administrative order in his favor (it was now April 2, 1970 and the state administrative order was jurisdictionally limited to the 1969-70 school year only). The United States District Court responded on June 5, 1970 by dismissing petitioner's Section 1983 action due to his failure/refusal to exhaust remedies available to him in the pending state administrative proceeding. The *dismissal was expressly without prejudice to re-instatement* of the Section 1983 action in United States District Court, *provided the pending state administrative proceeding was completed by petitioner in a good faith adversary manner.* The U. S. Court of Appeals affirmed without written opinion. This Court on October 12, 1971 denied certiorari. Petitioner then returned to state court to comply with the mandate of the Order of June 5, 1970. Upon, on February 18, 1972, receiving adverse decision from the State District Court, he petitioned the U.S. District Court for reinstatement of his Section 1983 action. Reinstatement was deemed *then premature* by the U.S. District Court, the Court noting in its order of February 23, 1972 that petitioner had an additional right of *appeal* under state law which *must first be exhausted in order to satisfy the stipulation of the order of June 5, 1970.* Petitioner then filed the requisite appeal from the adverse decision of the State District Court. Reported decisions of the Texas Court of Civil Appeals rendered in the state administrative proceeding give *indication* of *reason* administrative proceeding required until May of 1976 for final resolution (*Ball v. Kerrville Independent*

School District, 504 S.W. 2d 791 (Tex. Civ. App. 1973, err. Ref. n. r. e.) and *Ball v. Kerrville Independent School District*, 529 S. W. 2d 795 (Tex. Civ. App. 1975, err, ref. n. r. e.) . Almost simultaneously with issuance of final mandate in the state administrative proceeding, Ball, in May of 1976, *petitioned the U.S. District Court for reinstatement of his Section 1983 action*, alleging that full success in the state administrative proceeding established beyond reach of argument that he had performed in a "good faith adversary manner", thus, finally, satisfying the stipulation for reinstatement in the Order of June 5, 1970. The U.S. District Court did not agree. While acknowledging the earlier stipulation that petitioner's Section 1983 action would be reinstated providing Ball completed the state administrative proceeding as required, the U.S. District Court by Order dated November 19, 1976 found that petitioner had *not* performed in the requisite good faith adversary manner in the state proceeding and finally dismissed Ball's Section 1983 action. Petitioner's failure, as determined by the U.S. District Court, was that he "deliberately withheld his claim for reinstatement to the position he occupied before he was dismissed". Petitioner's effort on appeal was, therefore, devoted to demonstration that he had successfully obtained *all relief* which the state court had jurisdictional power to grant in the administrative proceeding, specifically, that the Texas State Board of Education, whose powers are limited by statute to correcting abuse of discretion in lower school authorities, *lacked jurisdictional power* to confer on petitioner any rights *additional* to those *vested in him under his one-year teaching contract for the 1969-70 school year.* By its decision of November 20, 1978, review of which is here sought, the U.S. Court of Appeals *bypassed this question entirely* and affirmed the dismissal of petitioner's Section 1983 action by the U.S. District Court by what it called a "different methodology." The U.S.

Court of Appeals determined that petitioner had *"failed to raise a substantial federal question"*. Thus, and *on its own motion*, the U.S. Court of Appeals, in effect, *sustained the dismissal by granting a summary judgment on the merits in favor of respondents.* The broad question thereby arising is:

> Whether such summary disposition by the Court of Appeals can be sanctioned under the facts here presented.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States, Amendment XIV, Section 1:

". . . nor shall any state deprive any person of life, liberty or property without due process of Law; nor deny to any person within its jurisdiction the equal protection of the Laws."

Title 42 U.S.C.A. Section 1983:

"Every person who, under color of any statute, ordinance, regulation, custom or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any Rights, privileges, or immunities secured by the Constitution and Laws, shall be liable to the party injured in an action at Law, suit in equity, or other proper proceeding for redress."

Additional jurisdictional basis invoked is:

28 U.S.C.A., 1331;

28 U.S.C.A., 1343 (3) and (4); and

28 U.S.C.A., 2201 and 2202

STATEMENT OF FACTS

Over the past nine and one-half years this case has progressed through three state administrative levels; through each of the three levels of state courts twice; and with this application for writ of certiorari is, for the second time, at the pinnacle of the three levels of federal courts. It is against this background that Gene Ball, petitioner, comes to this Court on this second occasion with not only the *Identical pleas,* but also the *identical caution* presented almost eight years earlier in Cause No. 70-199. First the *caution*:

> Whether or not, Gene Ball, petitioner (except to establish that he has plead a cause of action - that the questions raised in his Section 1983 action are not - and never were - "wholly unsubstantial and frivolous") is ultimately entitled to relief on merits is *not* here in issue - *because no issues which reach to the merits of his Section 1983 federal action are now,* anymore than they were eight years ago, *ripe for review;*

Then, the *plea*:

> The sole question is *whether he is entitled to his day in Court* (or now, eight years later, whether he has *earned* his day in Court).

The essential facts lack complexity, Gene Ball had taught math at the Tivy High School in Kerrville, Texas, for the six years immediately preceding the 1969-1970 school year. No hint of criticism as to his competency as a math teacher has been raised during these six years nor is it now. His contract for the 1969-1970 school year was terminated on September 3, 1969, for the sole reason that he refused to shave a Van-Dyke style beard which he cultivated during the summer of 1969. This petition for review on writ of certiorari by the Supreme Court of the United States is a link in the chain of endeavor in which Mr. Ball has been engaged since September 3, 1969, to secure re-instatement to his teaching position at the Tivy High School. The following is a synopsis of his efforts in this regard to date:

1. September 15 - open hearing held before respondents, The Board of Trustees of the Kerrville Independent School District. This meeting was convened for the express purpose of hearing evidence or points of view relevant to the earlier termination of Mr. Ball's contract on September 3, 1969;

2. September 23 - closed meeting held by respondent board members after which they announced that they would *not retract their action of September 3, 1969,* at which time they had terminated Mr. Ball's 1969-1970 teaching contract;

3. November 19 - hearing of Mr. Ball's appeal from the respondent board members action of September 3rd, had before Dr. Edgar, Com-

missioner of Education of the State of Texas, in Austin, Texas (Dr. Edgar supported the Respondent board members by decision rendered December 11);

(during 1970)

4. January 5 - hearing of Mr. Ball's appeal from the Commissioner's ruling had before the State Board of Education in Austin. *The State Board of Education is the highest administrative body established to govern public education in Texas.* The jurisdictional power of the State Board where, as here, reviewing termination by lower school authorities of a teacher's admittedly valid teaching contract during the term of the contract, *is limited to correcting abuse of discretion in lower school authorities,* and cannot extend to questions of law. *Dallas v. Moseley,* 286 S. W. 497 (Tex. Civ. App. - Dallas, 1926). The State Board overturned the Commissioner's decision by a vote of 8 to 7. The effect of the State Board's decision was to "restore the teacher and to make his contract good from the beginning." *Harkness v. Hutcherson,* 38 S. W. 1120 (Tex. Sup. Ct. 1897). Thus, arguably, *on January 5, 1970,* Mr. Ball's state remedy was adequate. This was at mid-term in the school year. His one-year teaching contract (running from July 1, 1969 until June 30, 1970) was still in effect. The time when contracts were to be renewed for the next year was then over two

months away. The *passage of time,* however, has *caused this basis upon which to argue a once-adequate state remedy to disappear;*

5. January 15, 1970 - at their next regularly scheduled meeting after Mr. Ball's position had been vindicated by the State Board, respondents considered his case. They took no action;

6. February 17, 1970 - at their next regularly scheduled meeting, respondents again considered Gene Ball's case. Again they took no action. That Gene Ball's intention was to resolve his difficulty at the *administrative level and out of court entirely* is evident in the fact that he awaited action from respondents at two of their regularly scheduled meetings after the State Board had held in his favor, *and, then, only after they filed their State Court Appeal did he take his case to Court;*

7. February 19, 1970 - The Kerrville Independent School District filed appeal in the District Court of Kerr County, Texas, from the decision of the State Board of Education;

8. February 27, 1970 - Gene Ball filed suit in United States District Court *seeking reinstatement, back pay* and *damages* (both actual and exemplary). Consideration of the merits of Gene Ball's federal contentions, while *premature before the record has been fully devel-*

oped, nevertheless, seems here in order due to the stated basis of the *per curium* opinion that Ball's claims *on their merits* are "wholly unsubstantial and frivolous". The following, while only an overview of his pleadings, is *conclusive,* it is submitted, that *such claims, if supported by proof, are substantial indeed.* Indication of Ball's Section 1983 allegations is:

(1) His teaching contract was terminated on September 3, 1969 due to his failure to shave a Van-Dyke beard he had cultivated during the summer. Also respondents refused *for the same reason* to offer Ball a renewal contract for the 1970-71 and subsequent school years. Such actions are violative of the substantive Liberty and Equal Protection of the Laws guarantees of the Fourteenth Amendment. *Lansdale v. Tyler Junior College,* 470 F 2d 659 (5th Cir. en banc - 1972); *Kelley v. Johnson,* 96 S. Ct. 1440 (1976). *Kelley,* in that interests of school authorities of State of Texas are finally expressed herein by State Board of Education (department of executive branch of State Government reviewing action of inferior department same branch), reaffirms the teachings of *Lansdale* as to burden of proof which must be sustained by respondents in Mr. Ball's Section 1983 action;

(2) On September 3, 1969, Mr. Ball's teaching

contract was terminated by respondents at a specially called meeting held on, at the most, 3 ½ hours notice to him and in his absence. Perhaps the requirement of Texas Law (Art. 6252 V. A. C. S.) that such meetings be held on no less than three day notice can furnish guidance here. If this three day requirement falls short of constitutional gravity, nevertheless 3½ hours notice is too short to meet constitutional muster where everything is at stake as here. See: 81 Harv. L. R. at 1452. In this instance, this violation of Procedural Due-Process guaranteed by the Fourteenth Amendment is compounded by the fact that *no rule* exists in the Kerrville Independent School District that teachers not wear beards. *Lucia v. Duggan,* 303 F. Supp. 112 (D. C. Mass. 1969); See also: *Lucas v. Chapman,* 430 F 2d 945 (5th Cir. 1970). Alleged is that his good name, honor and integrity were damaged within the meaning of *Board of Regents v. Roth,* 408 U. S. (1972). That respondents branded him with a badge of infamy he was not to shed in Kerrville, Texas for several years. Moreover, where in issue is *damages for termination* of an *existing contract,* Ball's *"property" interest* is *certain,* not illusory. *Perry v. Sinderman,* 408 U.S. 593 (1972);

(3) Ball's *right* to equal protection of the laws

was violated. *Lansdale v. Tyler Junior College,* 470 F 2d 659 (5th Cir. en banc - 1972). Moreover, under the Equal Protection clause of the Fourteenth Amendment it makes no difference even if the threatened interest be a privilege rather than a right. *Even a privilege* cannot, by state action, *be granted to some, but withheld from others where the basis of classification is arbitrary.* See: 81 Harv. L. R. 1439 at 1454 et seq.. Mr. Ball was directed to shave his beard to make it easier to enforce the policy that students be clean shaven. The *administration concedes that two members of the faculty were then wearing mustaches, although students were forbidden mustaches as well as beards;*

(4) That *lack of tenure* is *no defense* to an allegation that a *renewal contract was denied a teacher because he sought to exercise rights guaranteed by the Constitution of the United States is well established. Mt. Healthy School District v. Doyle,* 429 U. S. 274 (1977); *Serzing v. Fort Bend Independent School District,* 496 F 2d 92 (5th Cir. - 1974); *Pred v. Board of Public Instruction,* 415 F 2d 851 (1969); *Ferguson v. Thomas,* 430 F. 2d. 852 (1970); *Lucas v. Chapman,* 430 F 2d 945 (1970); See also: *Johnson v. Branch,* 364 F 2d 177 (4th Cir. 1966);

Greene v. Howard University, 412 F. 2d 1128 (D. C. Cir. 1969); and *Jones v. Hopper,* 410 F. 2d. 1323 (10th Cir. 1969). The basis underlying the above is axiom that, though there may be no "right" to a valuable government benefit, *the denial of it may not be predicated on one's exercise of rights guaranteed by the Constitution of the United States.* See: *Speiser v. Randall,* 357 U. S. 513.

Again, let it be emphasized that *no issue which reaches to the merits is now in posture for review.* The purpose in indicating substantive issues raised by the pleading *is,* at this point, *solely to show such claims to the both federal and substantial in nature.*

9. March 20, 1970 - Hearing had in United States District Court on Mr. Ball's motion for temporary injunction. Motion denied. The court further ordered that a hearing would be set immediately upon completion of administrative proceedings pending in state court. Particularly *in view of later activity which precipitated the order of dismissal of June 5, 1970,* it would appear not inappropriate to, at this point, quote language from the last few minutes of hearing March 20th indicative that Mr. Ball did not later *unreaonsably* misconstrue the *spirit* of the order of March 23rd:

Egan: - "Your Honor, I have submitted to my client as best I can, what the probabilities,

as I view them, would be if we let the Kerrville Independent School District's appeal in Kerr County District Court *go by default. In other words, if we, of our own volition wiped off our success in front of the state board.

"Now I have minimized the importance of dollars to Mr. Ball. I expect that probably they are as important to him as he has no extra source of money; he has got a wife and a child, got another child on the way, but if we win the state district court, I expect there would be an appeal from that. If we win again in the Court of -- whatever they call it --"

The Court: "Fourth Judicial District"

Egan - "Fourth Judicial District here in San Antonio, I wouldn't be at all surprised if there were an appeal from that to the State Supreme Court. Now, the additional step is doubtful - that the [U.S.] Supreme Court would review this kind of thing involving state law, *but what does seem very probable to me is that by winning we continue to postpone; . . . . I can't make a definite statement at this time, your Honor, but this is what our thinking is on it and I expect a decision will be made within less than a week. If my client so decides (we will withdraw the

answer that I filed in Kerr County District Court. We will let that one *go by default and we will continue down here, your Honor."

The Court: - "Well, if you adopt that course now, of course, I don't know; it's been almost 9 years since I have practiced in state court. I don't remember exactly what the rules are.

Can the case be dismissed or default judgment obtained, or if they obtain a default judgment, then you have resjudicata to worry about? I don't know. I think this is something you'd better give some thought to, *but if the situation there in Kerr County is eliminated, then there would be no reason why this Court couldn't proceed with it."

*emphasis supplied

(from pages 174, 175 of record from hearing on Temporary Injunction - Appendix to briefs in Court of Appeals, pages 38, 39, 40)

10. April 2, 1970 - Mr. Ball filed Second Amended Answer in the *state court appeal* then pending, in effect, *inviting the state court to hold adversely to him* on the asserted ground that he had neither the financial resources nor the time to engage in appellate action in the state courts

which would probably follow were he successful at the trial level (Mr. Ball had *reserved* his federal issues from the state proceeding for later determination by a federal court under the doctrine of *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964);

11. May 13, 1970 - Show cause order entered by United States District Court requiring Mr. Ball to *show cause why his federal case should not be dismissed in the event that he either failed or refused to contest the state proceeding in a good faith effort to win it.* The order stated that *"England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), recognized that a party may retain his right to pursue his federal claims in federal court by the simple expedient of informing the State Court that he intends, should the State Court hold against him on the question of state law to return to the District Court for disposition of his federal contention;"

12. June 5, 1970 - Order of dismissal entered by U. S. District Court (but *without prejudice to reinstatement provided he completed the state court proceeding in a good faith adversary manner) due to Mr. Ball's failure and/or refusal to exhaust the administrative remedies available to him in State Court.* In view of the per curiam majority opinion of the U.S. Court of Appeals that Ball's claims *on their merits*

are "wholly unsubstantial and frivolous", it seems in order to *again emphasize here* that the dismissal from *U. S. District Court was solely on procedural grounds.* Gene Ball's case was *not dismissed from Federal District Court* for failure to state a cause of action, or on summary judgment, or for *any reason* which reflects on the *merit* of his federal claims. While neither then nor now presented as findings of the court, two expressions from the bench; at the conclusion of the hearing, March 20, 1970, on petitioner's application for temporary injunction, *after which there have been no further proceedings of the merits,* indicated that the *federal district court did not regard Gene Ball's federal claims to be frivolous.* On page 33 of the Appendix, the court observed:

> *"*Now, if this had happened about the time the school year began, I don't think I would have been hesitant in granting a temporary injunction on the state of the record as it is now,* but what I am concerned about is the fact that we are toward the end of the school year."

*emphasis supplied.

and on page 36 is found the following statement of the court:

> *"*I think that he has raised a serious constitutional issue in this case, a very serious issue,*

and I certainly do not want to do anything to deprive him of the right to litigate it in this court if he feels that at some time he has not had full opportunity to do so in the state court, **but I do not think that in the meantime that I should interfere with the processes that are now in motion in the state court.*"

*emphasis supplied

The above are, at most, offhand expressions by the court and based on a record not then or now fully developed on its merits. They are quoted here solely because so clearly indicative that Gene Ball's federal claims were not regarded as unsubstantial by the district court after the record had developed to its present posture. Whether or not Gene Ball has a meritorious substantive federal claim is simply a question not *ripe for review*. The issues presented for review involve now, no less than in 1971, *remedies rather than rights*. They are *procedural rather than substantive*. As reflected in the language quoted from the bench as well as from the orders of the District Court issued March 23, 1970 (denying temporary injunction); May 13, 1970 (show cause); June 5, 1970 (dismissal), Februrary 18, 1972 (denying reinstatement to inactive status); February 23, 1972 (denying reinstatement *until* appeal); and November 19, 1976 (final dismissal); it is clear that the *substantive merit* (or lack of it) of Mr. Ball's federal claims played *no part in the dismissal of his suit from federal district court*.

Mr. Ball's position as to the procedural issue, the sole issue upon which the dismissal from the U.S. District Court was expressly based is - as is developed fully in his brief filed in the U.S. Court of Appeals:

> That he has fully complied with the condition stated in the order of June 5, 1970, and affirmed by the U.S. Court of Appeals under Rule 21 on May 4, 1971.

13. December 17, 1970 - Gene Ball's appeal to the U.S. Court of Appeals was denied. Speaking per curiam, the court expressed its reasoning as follows:

> " The Appellant, Gene Ball, has not demonstrated that he has any federally protected right which has been violated."

(during 1971)

14. May 4, 1971 - On petition for rehearing, the U.S. Court of Appeals *withdrew its original opinion* and substituted the following:

> "Judgment affirmed. See Local Rule 21." Gene Ball's Petition for rehearing en banc was also denied, the court *having been polled at the request of one of its members* and the majority of the Circuit Judges in active service not having voted in favor of it;

15. October 12, 1971 - Gene Ball's Petition for Writ of Certiorari denied by "this Supreme Court. Mr. Justice Douglas was of the opinion that certiorari should have been granted;

(during 1972)

16. January 18, 1972 - Pleading filed by Mr. Ball in U.S. District Court entitled: *"Information to the Court and Petition for Reinstatement to Inactive Status on the Docket of this Court Pending Completion of Administrative Proceedings now Pending in State Court by Plaintiff in a Good Faith Adversary Manner."* This pleading *reiterated Mr. Ball's ultimate prime goal of reinstatement to his teaching position* and recited procedural happenings in state court proceeding then to date. It raised spectre of later limitations issue and *emphasized ultimate necessity of return to federal court* due to absence of even "color" of *any* State remedy, adequate or otherwise, to reinstatement to his teaching position and/or damage claims other than for unpaid salary under one-year teaching contract; *no matter what was the outcome of the state proceeding*;

17. February 18, 1972 - Order of U.S. District Court *denying* reinstatement to inactive status for failure to have then satisfied conditions of order of June 5, 1970. This order was also *expressly without prejudice* to petitioning for reinstatement *after fulfillment of conditions;*

18. February 18, 1972 - Order of Texas State Board of Education favorable to Gene Ball overruled by state district court in administrative proceeding;

19. February 20, 1972 - Petition for reinstatement of his Section 1983 action to active status on docket of U.S. District Court filed by Gene Ball. Mr. Ball asserted that he *had* completed the proceedings pending in State Court in a good faith adversary manner satisfying conditions of Order of June 5, 1970;

20. February 23, 1972 - Gene Ball's petition for reinstatement *denied* by U.S. District Court. Basis for denial was statutory right under local (Texas) law vested in Gene Ball to *appeal* adverse decision of state district court to Texas Court of Civil Appeals, *hence conditions of order of June 5, 1970*, the court held, *"still have not been satisfied"*. This action of U.S. District Court (though not anticipated by Mr. Ball) was *perfectly consistent with conditions of its order of June 5, 1970*, already upheld and sanctioned by the U.S. Court of Appeals, *as in such statutory proceedings powers of review of administrative order vested in state district court and Texas Court of Civil Appeals are *identical.* It was *exhaustion of state remedies* which was being required of Mr. Ball, the U.S. District Court having earlier rejected Mr. Ball's attempt to *give back* his one year's salary at issue in the state proceeding (by inviting state

district court to hold adversely to him in appeal filed by school district 8 days before he filed his Section 1983 Action). Mr. Ball then *did* have another step to go if he was to satisfy the order of June 5, 1970 as upheld and sanctioned by the U.S. Court of Appeals;

(during 1973)

21. February 28, 1973 - Judgment rendered by Texas Court of Civil Appeals *reversing* judgment of the state district court but *remanding* to trial court for a new trial as trial court had limited its review to the administrative record. (*Ball v. Kerrville Independent School District*, 504 S. W. 2d 791 (Tex. Civ. App. - San Antonio, 1973);

(during 1974)

22. January 30, 1974 - Motion for rehearing filed by both Mr. Ball and the school district overruled by the Texas Court of Civil Appeals;

23. April, 1974 - Application for Writ of Error filed by school district in Texas Supreme Court refused n.r.e.;

24. October 3-10, 1974 - Trial on remand held in state district court (under decision rendered by Texas Court of Civil Appeals district court sitting in this statutory appellate posture was to apply statutory standards of *review to record made in district court* based on conditions as they existed January 5, 1970, rather than to record made before Commissioner of Education to which earlier review had been limited);

(during 1975)

25. March 20, 1975 - Order of Texas State Board of Education favorable to Gene Ball overruled by state district court for the second time. (this placed Mr. Ball in identical posture for *second time* to which the U.S. District Court had *already responded in its order of February 23, 1972.* Mr. Ball had *no choice* but to for the second time appeal to the Texas Court of Civil Appeals *if he was to satisfy the condition of the Order of June 5, 1970 of the U.S. District Court as affirmed and sanctioned by the U.S. Court of Appeals*;

26. October 15, 1975 - Judgment rendered by Texas Court of Civil Appeals reversing decision of the state district court and awarding unpaid salary under 1969-1970 teaching contract to Gene Ball with statutory interest from February 19, 1970 and costs;

27. November, 1975 - school district's motion for re-hearing denied by Texas Court of Civil Appeals;

(during 1976)

28. February 25, 1976 - Application for Writ of Error filed by school district in Texas Supreme Court refused n. r. e.;

29. March 12, 1976 - Last day for filing motion for re-hearing in Texas Supreme Court by school district allowed to pass without action. Finality of Judgment of November 15, 1975 thus assured;

30. May 10, 1976 - Order authorizing transfer of costs taxed by Appellate Court entered by state district court, thereby removing last obstacle to issuance of mandate;

31. May, 1976 - Gene Ball filed Petition that his Section 1983 action be reinstated to active status on the docket of the U.S. District Court. That he had *fully complied with the conditions of the Order of June 5, 1970*, he asserted was established by his having obtained *down to the penny* all relief *possibly* affordable in the state proceedings;

32. November 19, 1976 - Order entered by U.S. District Court denying Gene Ball's Petition for Reinstatement. As basis for its order the court explained:

> ". . . and it further appearing that in the State Court Plaintiff **deliberately withheld his claim for reinstatement to the position he occupied before he was dismissed* (the remedy he seeks in this court) despite the fact **that under Texas Law the effect of the Order of the State Court would have been to afford him that relief,* thus fully demonstrating his **failure to complete the administrative proceedings in a good faith adversary manner as required. . .*"

*emphasis supplied

(during 1978)

33. November 20, 1978 - Judgment of dismissal by U.S. District Court affirmed by U.S. Court of Appeals. Court of Appeals used different "methodology". It found Gene Ball's federal claims *on their merits* to be *"wholly unsubstantial and frivolous"*. The U.S. Court of Appeals, then, in effect, and on its own motion, granted a *summary judgment in favor of respondents.*

34. December 20, 1978 - Petitioner's motions for rehearing and rehearing en banc denied by U.S. Court of Appeals.

In the above is concluded resume' of happenings in this case to date. Seen in the above is that the issue presented for review *is* whether summary judgment as here granted by U.S.

Court of Appeals on its own motion can here be sanctioned. A final word before turning from the factual back ground of this case.

The *span of time* consumed by this case may be not only mind-bogging, but, also, misleading. Judge Godbold's characterization of Gene Ball as having been "locked in mortal combat" with respondents in the State Administrative proceeding (opinion page 1104, Col. 1) *is misleading.*

That to whatever extent Ball ever became "locked in mortal combat", such was *in response to the mandate of the U.S. District Court* as affirmed by the U.S. Court of Appeals on May 4, 1971, and *then* only after this Court denied certiorari on October 7,1971. Rather than seeking to *contest* the state proceeding, when filed, Gene Ball on April 2, 1970, expressly by pleading, *invited* the state court to hold *adversely* to him, so he could proceed immediately in his Section 1983 action. It was in response to Ball's failure to *contest* the state proceeding that the U.S. District Court on June 5, 1970 dismissed his action but without prejudice to reinstatement, provided Ball completed the state administrative proceedings "in a good faith adversary manner".

Petitioner's first appeal to the U.S. Court of Appeals was based upon (in agreement with Judge Godbold) his assertion that the stipulation in the district court's order was not a "barrier" to litigation of his federal claims in federal court (with apparent concurrence of the Judge who polled the U.S. Court of Appeals for rehearing en banc and Mr. Justice Douglas who voted for certiorari).

So after denial of certiorari, Ball did all that was left for

him to do. He went back to the State Court and *tried to win.* When he *lost*, however, on February 18, 1972, he *immediately petitioned* the U.S. District Court for *reinstatement.* Reinstatement was deemed *premature,* however, as Ball was found by the U.S. District Court to then have an *as yet unexhausted right to appeal in the state administrative proceeding.*

What, *really only then,* became "mortal" about the combat was *Ball's effort to keep it moving.* This is evidenced by: his 3 motions for trial setting in state district court; petition for writ of *mandamus* filed in Texas Court of Civil Appeals March 19, 1975 to *make state district judge render judgment*; motion to expedite second appeal in Texas Court of Civil Appeals filed August, 1975; Motion to expedite recent appeal to U.S. Court of Appeals, denied January 14, 1977; and motion for priority in calendering oral argument in U.S. Court of Appeals, denied September, 1977.

Submitted is that Mr. Ball *has done what he had to do and as quickly as possible.* The *goal at all times* was to *get started on his Section 1983 action.* As to the "vindication" (opinion p. 1104, Col. 2), Ball had stated through his attorney at the March 20, 1970 hearing in the U.S. District Court:

> ". . . but what we are saying is *that payment of full salary is not what we want.** I suspect, without knowing, that we could have had this for the asking back in September without any administrative hearing any where, without any court proceeding. *This is not what he wants, Your Honor.*" (Appendix, page 21)

*not *all* that was sought. Only in *Federal Court* was *reinstatement (including* back pay) *and damages* available.

REASONS FOR GRANTING THE WRIT

1. *The finding of the U. S. Court of Appeals that Gene Ball failed to raise a substantial federal question conflicts directly with this Court's decision in Kelley v. Johnson,* 425 U.S. 238 (1976). *The discharge of petitioner for refusal to remove his van-dyke beard and refusal to grant him renewal contracts for the same reason violated his right to substantive "liberty" guaranteed by the Due Process Clause of the Fourteenth Amendment.*

At the outset let it be noticed that *only* the *procedural* aspects of the Due Process Clause of the Fourteenth Amendment were addressed by the majority in their *per curiam* opinion. All cases cited by the majority in support of their conclusion that petitioner "failed to raise a substantial federal question" relate only to the *procedural* aspects of Due Process. But Gene Ball's *more significant allegation,* overlooked also by Judge Godbold in his concurring opinion, is that his *substantive* right to "liberty" guaranteed by the Fourteenth Amendment was violated by respondents by his constitutionally unacceptable discharge *and by their refusal for the same reason to offer him a renewal contract for the 1970-71 and subsequent school years.* As stated by this Court in *Kelley,* the Due Process Clause of the Fourteenth Amendment provides *broader protection* than was recognized by the Court of Appeals;

> " This section affords not only a procedural guarantee against the deprivation of "Liberty". **but likewise protects substantive aspects of Liberty against unconstitutional restrictions by the State. Board of Regents v. Roth,* 408 U.S. 564, 572 (1972); *Griswold v. Connecticut,* 381 U.S. 479 (1965), White, J., concurring."
>
> (425 U.S. at 244)

*emphasis supplied

One perhaps *vital point of distinction* exists between the situation of the policeman in *Kelley* and the teacher (petitioner) here. This being that in *Kelley* the *Police Force of Suffolk County, New York spoke for the State of New York.* In petitioner's case, however, it is not *respondents* but the *Texas State Board of Education* which speaks for the State of Texas. Explanation is required.

First of all it *is* respondents (and their successors) who, in Texas, as managing agents of the local school district (which under Texas Law is like a municipal corporation, *Love v. Dallas,* 40 S. W. 2d 20 (Tex. Sup. Ct. - 1931), have *exclusive* power to hire and dismiss teachers. Texas Education Code, Sections 13-101 - 13-114. Respondents, then, *are* the persons in interest for purposes of relief sought by petitioner in his Section 1983 action. *Harkless v. Sweeny Independent School District,* 427 F.2d 319 (5th Cir. - 1970); *City of Kenosha v. Bruno,* 412 U.S. 507 (1973); *Sterzing v. Fort Bend Independent School District,* 496 F 2d 92 (5th Cir. - 1974). *BUT THE POSITION OF THE STATE OF TEXAS, AS EMPLOYER, WITH RESPECT TO THE DISCHARGE OF PETITIONER FOR REFUSING TO SHAVE HIS VAN-DYKE BEARD IS EXPRESSED NOT BY RESPONDENTS, BUT BY THE TEXAS STATE BOARD OF EDUCATION.* This is because under applicable Texas Law the question of whether or not good cause exists for discharge of a school teacher is in Texas a *question of fact relating to the internal*

affairs of a public school and, as such, is relegated ultimately to the discretion of the Texas State Board of Education, Gragg v. Hill, 58 S. W. 2d 150 (Tex. Civ. App. - Waco, 1933) err. ref.; *Blair v. Board of Trustees, Trinity Independent School District,* 161 S. W. 2d 1030 (Tex. Civ. App. - 1942). As explained in *Whitmarsh v. Buckley,* 324 S. W. 2d 298 (Tex. Civ. App. - Houston, 1959) at 303:

> ". . . The statutes all contemplate ultimate supervision of administrative affairs of our public schools by the State Board of Education. *In appeals to them there is one department of the executive branch of the government reviewing the action of an inferior department of the same branch of government."*

Perhaps ultimate authority that the State of Texas *as employer* has here expressed itself through the State Board of Education is that such has become the *law of this case. Ball v. Kerrville Independent School District,* 504 S. W. 2d 791 (Tex. Civ. App. - 1973) err. ref. n. r. e.; *Ball v. Kerrville Independent School District,* 529 S. W. 2d 792 (Tex. Civ. App. - 1975) err. ref. n. r. e.

Here petitioner has sought the protection of the Fourteenth Amendment, (as in *Kelley*) not as a member of the citizenry at large, but as an employee of the Kerrville Independent School District. If it must follow here (as in *Kelley*) that the interest of the *State as Employer* is to be decisive in assessing the quantum of proof to be sustained, arguably it should shift the burden to *respondents* to demonstrate petitioner's choice to present himself to the world with a van-dyke beard to be irrational (an even tougher test than

the clear and present danger test applied where limitation of First Amendment freedoms is in issue, and, incidentally, the test established en banc by the Court of Appeals for the Fifth Circuit where an *adult's* freedom to wear his *hair* as he pleases is in issue. *Lansdale v. Tyler Junior College,* 470 F. 2d 659 (5th Cir. - en banc - 1972) Cert. denied, 411 U.S. 986)).

Speaking for the Court in *Kelley,* Mr. Justice Rehnquist *assumed* that the citizenry at large had a "liberty" interest in matters of personal appearance. Mr. Justice Powell, concurring, found no negative implication in the opinion with respect to a liberty interest within the Fourteenth Amendment as to matters of personal appearance citing *Poe v. Ullman,* 367 U.S. 497 (1961) at 541-543. Mr. Justice Powell further noted that the State in *Kelley* had an interest in regulating the appearance of its police officers which *outweighed,* there, the officer's individual liberty interest. *Kelley,* however, and throughout, was carefully limited to its context of a *uniformed police force.* As pointed out by judge Godbold with reference to *Kelley* in his concurring opinion, "It hardly seems possible that such considerations apply to a high school teacher, but *in any event this would be an issue for a trial court to address and decide."* (opinion below, page 1103, Fn 2).

A further distinction from *Kelley,* is that *here no rule* existed in the Kerrville Independent School District that teachers not wear beards. Nor was there such a rule *after* September 3, 1969, the date of petitioner's discharge, nor does such a rule exist at the present time. *Ball v. Kerrville Independent School District,* 529 S. W. 2d 792 (Tex. Civ. App. - 1975) err. ref. n. r. e. at 794; cf. *Lucia v. Duggan,* 303 F. Supp. 112

(D. C. Mass. - 1969).

In *Kelley*, due to lack of *specific* guidance in earlier decisions of this Court, it was *assumed* that the citizenry at large has a "liberty" interest within the Fourteenth Amendment in matters of personal appearance. Respectfully submitted is that the following explanation for this silence offerred by Mr. Justice Marshall in his dissenting opinion in Kelley (425 U. S. 249-256) *is* supported by both history and logic:

> " If little can be found in past cases of this Court or indeed in the Nation's history on the specific issue of a citizen's right to choose his own personal appearance, it is only because the right has been so clear as to be beyond question. When the right has been mentioned, it sexistence has simply been taken for granted."
>
> (425 U. S. 251)

Submitted is that in Judge Doyle's reasoning in *Breen v. Kahl*, 296 F. Supp. 702 (W. P. Wisconsin - 1969), aff'd 419 F 2d 1034 (7th Cir. - 1969) cert. denied 308 U. S. 937, was *foreseen* most, if not all, factors with which courts would later wrestle in the many personal appearance cases to follow. The conclusion of Judge Doyle in 1969 is consistent with the teachings of *Kelley*:

> " Equally inevitable, I believe, would be a judgment that the **freedom of an adult male or female to present himself or herself physically to the world in the manner of his or her choice is a highly protected freedom.* An effort to use the power of the state to impair this freedom must also bear

> a substantial burden of justification', whether the attempted justification be in terms of health, physical danger to others, obscenity, or 'distraction' of others from their various pursuits. For the state to impair this freedom, in the absence of a compelling subordinating interest in doing so, would **offend a widely shared concept of human dignity, would assault personality and individuality, would undermine identity, and would invade human 'being'.* It would **violate a basic value 'implicit in the concept of ordered Liberty', Palko v. Connecticut,* 302 U. S. 319 (1937). It would *deprive a man or a woman of liberty without due process of law in violation of the Fourteenth Amendment.* See *Griswold*, 381 U. S. at 499-500 (Harlan, Jr., concurring)."
>
> (296 F. Supp. at 706)
>
> *emphasis supplied
>
> Footnoted here was that discussion of military and penal institutions (the rationale of the uniformed police force of *Kelley*) would follow at later point in decision.

Submitted at this point is that petitioner's allegation of violation of the substantive aspects of "liberty" within the Fourteenth Amendment raised a *substantial federal question.* This would require *remand to the U. S. District Court for resolution,* unless it can be said as a *matter of law* that award of *NONE* of the relief sought by petitioner in the trial court, being:

(1) *reinstatement* to his teaching position;

(2) *back pay* for all or any years after the 1969-70 school year and whether viewed as part of equitable reinstatement or basis for award of damages; or

(3) *damages*, both actual and exemplary and distinguished from back pay, alleged to have resulted from violation by respondents of petitioner's federally protected rights',

could be based upon *ADMITTED* violation by respondent's of petitioner's federally protected guarantee of substantive "liberty" as alleged.

2. *The finding of the U. S. Court of Appeals that Gene Ball failed to raise a substantial federal question conflicts directly with recent decisions of the Fifth Circuit, being Lansdale v. Tyler Junior College,* 470 F 2d 659 (5th Cir. - 1972 en banc) cert. denied 411 U. S. 986; and *Hander v. San Jacinto Junior College,* 519 F 2d 273 (5th Cir. 1975). *Moreover, under the Equal Protection Clause of the Fourteenth Amendment it makes no difference if the threatened interest be a privilege rather than a right. Even a privilege cannot be granted to some by state action, but withheld from others where the basis of classification is arbitrary. The discharge of petitioner for refusal to shave his van-dyke beard and refusal to offer him a renewal contract for the 1970-71 and subsequent years violated his right to equal protection of the laws guaranteed by the Fourteenth Amendment.*

Two *en banc* decisions handed down by the Fifth Circuit back-to-back are best considered together. In *Karr v. Schmidt*, 460 F 2d 609 (5th Cir. - en banc, 1972) cert. denied 409 U.S. 989, by a divided court (8-7), a plurality of the U. S. Court of Appeals for the Fifth Circuit, *in specific context of a sixteen year old high school student challenging a grooming code formally adopted by school authorities,* upheld the school authorities and announced a per-se ruling that such reulations are constitutional. Thus *Karr,* as finally decided, vindicated the tenor of the language employed by Mr. Justice Black in his earlier (February 11, 1971) opinion *pro-se* denying plenary relief sought by Karr. *Karr v. Schmidt*, 401 U. S. 1201 (Feb. 11, 1971). From this, however, it does *not* follow that *Karr* was *ever* apposite here. The U. S. District Court when citing Mr. Justice Black's pro-se opinion to the petitioner, in its order of February 23, 1972 (Appendix C - pages (A-12, 13, 14), apparently *misunderstood* that the orbit of *Karr* (and of Mr. Justice Black's *pro-se* opinion) was *carefully delimited* to challenge by a *high school student* to *a formalty adopted dress code.* Emphasis to the above was specifically added by the court:

> "It seems patently absurd to suggest that our decision here today provides a basis for sustaining a state regulation requiring conventional haircuts for the general adult population. *Richards v. Thurston,* 424 F 2d 1281, 1285; Mr. Justice Douglas dissenting opinion to denial of certiorari in Ferrell v. *Dallas Independent School District,* 392 F 2d 697 (5th Cir. - 1968) reported 393 U. S. 856. (Fn. 13, 460 F2d at 615)

Lingering doubt, if any, that *Karr*, as decided, was never apposite here was removed by the Fifth Circuit, again en banc, in sequential decision handed down six months later.

In *Lansdale v. Tyler Junior College*, 470 F 2d 659 (5th Cir. - 1972 en banc) cert. denied, 411 U. S. 986, the court, again divided (9-6), upheld a college student's, and, legislatively, *all* students similarly situated, claim that enforcement of a particular section of the "Dress Code" applicable to hair length was arbitrary, unreasonable and violative of rights secured by the *Equal Protection Clause* of the Fourteenth Amendment. Decisive in *Landsdale* was that, even if by necessity arbitrarily placed, the line between remaining a child and becoming an adult was drawn between the high school door and the college gate. The basis for *Karr* was finding that regulation of personal hair grooming of *high school students* by officials charged with the important state objective of regulating young people *does not back a rational basis.* In *Lansdale*, the court drew the line where, absent extraordinary facts, *this rational basis ceases to exist with reference to the adult population at large.* In the language of the Court:

> ". . .Today the Court affirms that **adult's constitutional right* to wear his hair as he chooses supercedes the State's right to intrude. **The place where the line of permissible hair style regulation is drawn is between the high school door and the college gate.*"
>
> (470 F 2d at 633)

*emphasis supplied

In *Hander v. San Jacinto Junior College*, 519 F 2d 273 (5th Cir. - 1975) opinion aff'd on petit. for reh., 522 F 2d 204 (5th Cir. - 1975), *Lansdale* was applied to a college-level teacher. In the above three cases from the Fifth Circuit, and analysis of distinction between a high school teacher and the uniformed policeman before this Court in *Kelley*, lies the cited basis for Judge Godbold's conclusion in his specially concurring opinion that:

> " Ball would be **entitled to his day in court on protection claim unless there is some barrier.*"
>
> (opinion page 1103, Col. 2)

*emphasis supplied

While, in the above is seen more than sufficient basis for Judge Godbold's conclusion that *summary disposition is not here warranted* (absent other "barrier"), there is *still further basis for application of the Equal Protection Clause here.*

Under the Equal Protection Clause of the Fourteenth Amendment *in circumstances here* it would make no difference *even if the threatened interest be a privilege rather than a right.* Even a privilege cannot by state action be granted to some, but withheld from others where the basis of classification is arbitrary. See: 81 Harv. L. R. 1439, at 1454 et seq. Mr. Ball was directed to shave his beard *to make it easier to enforce the policy that students be clean shaven. The administration concedes that two members of the faculty were then wearing mustaches also students were forbidden mustaches as well as beards.*

Submitted at this point is that petitioner's allegation of

violation of the Equal Protection of the Laws Guarantee of the Fourteenth Amendment raised *a substantial federal question.* This would require *remand to the U. S. District Court for resolution,* unless it can be said as a *matter of Law* that award of *NONE* of the relief sought by petitioner in the trial court, being:

(1) reinstatement to his teaching position;

(2) *back pay* for all or any years after the 1969-70 school year and whether viewed as part of equitable reinsttement or basis for award of damages; or

(3) *damages,* both actual and exemplary and distinguished from back pay, alleged to have resulted from violation by respondents of petitioner's federally protected rights;

could be based upon *ADMITTED* violation by respondents of petitioner's federally protected guarantee of the equal protection of the laws as alleged.

3. *The finding of the U. S. Court of Appeals that Gene Ball failed to raise a substantial federal question conflicts directly with the decision of Court in Perry v. Sindermann,* 408 U. S. 593 (1972); *Board of Regents of State Colleges v. Roth,* 408 U. S. 564 (1972), and *Paul v. Davis,* 424 U. S. 693 (1976). *The discharge of petitioner without hearing and in his absence on September 3, 1969, and subsequent failure to grant him a hearing prior to refusal of a renewal contract for 1970-71 and subsequent school years violated his right to procedural due process guaranteed by the Fourteenth Amendment.*

Both *Roth* and *Sindermann* deal with *non-retention* of untenured teachers. *Paul v. Davis* merely says that damage to *reputation* outside of *employment situation* does not give rise to action under the Procedural Due Process Clause. Deemed self-evident, apparently (as by Justices Marshall and Brennan in their dissenting opinion in *Kelley* and Judge Doyle in *Breen v. Kahl, Supra,* that the general adult populace would enjoy a protected "liberty" interest in matters of personal appearance), was that *different* rules govern in the case of a teacher *under contract, when discharged at the commencement of his contract term without a hearing, in his absence, for a constitutionally proscribed reason, and for violation of a "rule" which never existed.* This, however, is what happened on September 3, 1969 (the *first day* of classes of the 1969-70 school year) to petitioner. It is true that almost two weeks later on September 15, 1969 (*after* extensive publicity and damage to petitioner's reputation) a hearing was granted at which petitioner appeared with counsel. Alleged in petitioner's Section 1983 action is that *no evidence* was adduced at this hearing which could support respondent's action of September 23, 1969, when they "re-affirmed" their *earlier termination of Mr. Ball's existing teaching contract on September 3, 1969.* No matter what the procedural safe guards might have been, there must be *some* relation between matters presented at the hearing and the result thereof. *Ferguson v. Thomas,* 430 F 2d 852 (5th Cir. 1970). Moreover, Mr. Ball was *discharged for violation of a "rule" which "rule" does not, did not and never has existed.* cf. *Lucia v. Duggan,* 303 F. Supp. 112 (D. C. Mass. 1969; *Lucas v. Chapman,* 430 F 2d 945 (5th Cir. -1970). Mr. Ball's *property interest* on September 3, 1969, the *first day of classes* under his *then-existing* contract with respondents is *certain,* not illusory. *Perry v. Sindermann,* 408 U. S. 593

(1972). The requisite employment relation between respondents, acting under color of state law, and petitioner, their employee dismissed during his *contract term*, was *certain*, not illusory. *Paul v. Davis*, 424 U. S. 693 (1976).

The decision of this Count in *Board of Regents of State Colleges v. Roth*, 408 U. S. 564 (1972) speaks of a "badge of infamy" resulting from circumstances surrounding failure to *renew* or *re*-hire as being requisite to trigger federal protection of procedural due process. Confusion may have resulted from Mr. Ball's having *alleged severe damage to his reputation and standing in the community resulting from termination of his existing contract* in violation of his federally protected right to procedural due process (as well as to the substantive aspects of "liberty" and equal protection of the Laws guaranteed by the Fourteenth Amendment) over and above loss of salary payable under the contract. *Issues of fact are here raised which must be determined by trial on the merits in the U. S. District Court.*

4. That there is *no barrier* (as Judge Godbold indicated there was in his specially concurring opinion) *to Mr. Ball having his day in court on his claim to reinstatement, and back pay.*

In Mt. Healthy City School District v. Doyle, 429 U. S. 274, 97 S. Ct. 568 (1977) this court affirmed that:

> " Doyle's claims under the First and Fourteenth Amendments are not defeated by the fact that he did not have tenure. Even though he could have been discharged for no reason whatever, and had no constitutional right to a hearing prior to the decision not to rehire him. *Board of Regents v. Roth*, 408 U. S. 564 (1972), he may nonetheless establish a claim to reinstatement if the decision not to rehire him was made by reason of his exercise of constitutionally protected freedoms. *Perry v. Sindermann*, 408 U. S. 593 (1972).

Mr. Ball's claim is based on the equal protection and substantive "liberty" guarantees of the Fourteenth Amendment rather than on the speech guarantee of the First. While the *language* used in *Sindermann* (408 U. S. 593) was broader, at *issue* there was also a First Amendment question. In *Sindermann*, this court did, however, *indicate* that a First Amendment issue was *not essential*:

> "For at least a quarter-century this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons, upon which the government may not rely. **It may not deny a benefit to a person that infringes his constitutionally protected interests* - especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to '*produce a result which [it] could not command directly.' *Speiser v. Randall*, 357 U.S. 513. **Such interference with constitutional rights is impermissible.*"
>
> (408 U. S. at 597)

*emphasis supplied

So while the language *is broader* - in *Sindermann* reinstatement of a non-tenured teacher after expiration his contract term could be *placed in issue* and decision vested, originally, in the *sound discretion of the trial court, as are all other matters of equity* - in *issue*, again, in *Sindermann*, were *First Amendment Rights.*

Perhaps in the *test* to be applied to determine if there has been violation of federally protected rights, upon which *any* remedy can be based may be found guidance. The "balancing" test of *Pickering v. Board of Education*, 391 U. S. 563 (1968) was first applied in *Mt. Healthy* (429 U. S. at 284), to initially determine that First Amendment Rights *had* been violated. New in *Mt. Healthy* was the added requirement, to be determined on remand in the trial court, that it must be determined by a preponderance of the evidence that the decision not to re-hire would *not have been made in the absence of the protected conduct.* If granted the remand to the trial court that he is here seeking, Mr. Ball *is* prepared to establish there by preponderance of the evidence that the alleged infringement of his rights of "liberty" and equal protection of the laws are *not counterbalanced* by legitimate competing interests of respondents in promoting efficient operation of the school. He is further prepared to establish by requisite proof that *neither his discharge nor subsequent refusals to renew his one year teaching contract* would have happened in the *absence of the protected conduct.* What still remains is that *his* is a claim based on the *Fourteenth* Amendment, where in *Mt. Healthy* was an asserted violation of a *First* Amendment Right.

While still looking at *tests* for guidance, it is seen that this Court specifically observed in *Kelley v. Johnson*, 425 U. S. 238 (1976), with reference to distinction between assertion of First and Fourteenth Amendment rights:

> "More recently, we have sustained comprehensive and sub-substantial restrictions upon activities of both federal and state employees lying at the core of the First Amendment. *Civil Service Comm'n v. Letter Carriers*, 413 U. S. 548 (1973); *Broadrick v. Oklahoma*, 413 U. S. 601 (1973). **If such regulations may survive challenges based on the explicit language of the First Amendment, there is surely even more room for restrictive regulations of state employees where the claim implicates only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment.*"
> (425 U. S. at 245)
>
> *emphasis supplied

But making all reasonable allowance for whatever amount of extra latitude or "more room" to which the State may be entitled when defending a claim based on "only the more general contours of the substantive liberty interest protected by the Fourteenth Amendment", *THIS IS STILL A FAR CRY FROM SAYING THAT NO SUCH CLAIM COULD BE SUFFICIENT* (AS COULD A FIRST AMENDMENT CLAIM) *GROUND UPON WHICH TO VEST EQUITABLE DISCRETION IN THE TRIAL COURT TO GRANT REINSTATEMENT. Such is the necessary conclusion,* however, *if Judge Godbold's conclusion,* "on the facts of this case, the theory [that Ball is now entitled to reinstatement] blinks at reality" (opinion page 1104, Col. 1) *is to be sustained.* It is, perhaps of more than passing interest at this point to note the prob-

able effect of *Texas* Law, that the interest of the State of Texas with regard to petitioner's personal appearance is expressed by the State Board of Education, rather than by respondents, would be to shift the burden of proof placed on the policeman in *Kelley* to the respondents at trial on remand here. (See: discussion on pages 26 and 27, *supra*).

But Gene Ball's claim under the Fourteenth Amendment to reinstatement is *not* rested solely on its substantive (and peripherally, procedural) Liberty guarantee. As noted by the majority per curiam opinion of the Court of Appeals and *emphasized by Judge Godbold*, petitioner *also* challenges his discharge and refusal of respondents to grant him a renewal contract for the 1970-71 and subsequent school years as *violative of his rights under the equal protection of the laws guarantee*. This Court can judicially notice the flood of cases arising from displacement of untenured Negro teachers with one-year contracts during the 1960's and early 1970's, who were *often reinstated* after *several* years had passed. Perhaps a landmark example is *Johnson v. Branch*, 364 F2d 177 (4th Cir. - 1966). Important here is that the result is achieved by application of *judicial discretion to the equal protection of the laws guarantee of the Fourteenth Amendment.* Submitted is that petitioner is not barred *from the orbit of such protection*, solely because he *happens not to be a Negro*, if he can demonstrate an *otherwise meritorious claim under the Equal Protection Clause*.. Also, only, incidentally, involving Negro Teachers was *United States v. Cotton Plant School District No. 1*, 479 U.S. 671 (8th Cir. - 1973) wherein was affirmed:

> "The rule uniformly followed in this circuit as established in *Smith v. Board of Education of Morn-*

> *ilton School District No. 32*, 365 F 2d 770 (8th Cir. 1966), is that a teacher who is **wrongfully discharged* is entitled to be **restored*, as equitably as possible, to the status quo, that is to his or her position and equivalent salary status enjoyed prior to the **discriminatory* discharge."
>
> (479 F2d 673)

*emphasis supplied

Noteworthy is that in *Webb v. Lake Mills Community School District*, 344 F. Supp (N. D. Iowa - 1972) where, the findings of fact upon which reinstatement was there granted read alsmost verbatim like Mr. Ball's pleadings in the trial court here, the district court relied upon *Connally v. General Contractor Co.*, 269 U. S. 385, for the following propositions specifically addressed to absence of a *rule* there:

> "It is the prevailing law of the land that no person shall be punished for conduct **unless such conduct has been proscribed in clear and precise terms.*"
>
> (344 F. Supp. at 801)

*emphasis supplied

As in *Webb*, here there was and is *no rule* proscribing facial hair on teachers.

Reinstatement, as is the case *with any equitable remedy*, is, in the *first instance*, vested in the sound discretion of the trial court which is to be *afforded latitude to weigh all factors leading to the remedy ultimately chosen*, cf. *Sterzing v. Fort Bend Independent School District*, 496 F 2d 92 (5th

Cir - 1974) wherein a single limitation was imposed as follows:

> "In declining to grant reinstatement [however, the sum of $20,000.00 had been awarded *in lieu thereof] *on the basis that it would be too antagonisic, the court used an impermissible ground . . . . Enforcement of constitutional rights frequently has disturbing consequences. Relief is not restricted to that which will be pleasing and free of irritation."*
>
> (496 F2d at 93)

*emphasis supplied

The plea of the petitioner with respect to reinstatement and back pay, or combination of either *as may be fashioned in the sound discretion of the district court* based on weighing of all circumstances *after full hearing,* finds echo in the following from *Unified School District No. 480 v. Epperson,* 551 F 2d 254 (10th Cir - 1977), after weighing this Court's recent decision in *Mt. Healthy*:

> " To reach a contrary result in the instant case would to us be a bit incongruous, **in that we would be holding that there was no relief or remedy whatsoever for an admitted violation of a constitutional right."*
>
> (551 F2d at 260)

*emphasis supplied

5. *There there is no barrier* (as Judge Godbold indicated there was in his specially concurring opinion) *to Mr. Ball*

having his day in court on his damage claims, both actual and exemplary.

In *Wood v. Strickland,* 420 U. S. 308 (1975) this court held that a school board member is *not immune from damages* under Section 1983 *if he knew or reasonably should have known* that the action he took within the sphere of official responsibility would violate the constitutional rights of the person affected, or if he took the action with intention to cause such result. In either case, this court held, the action of the school official cannot be characterized as being in good faith. *This is exactly what petitioner has alleged in his Section 1983 action which he seeks to have determined in U. S. District Court.*

In any event, immunity from damages does not ordinarily bar equitable relief as well (*Wood* 420 U. S. at 314). Judgment against the respondent board members in their *official capacities* for equitable reinstatement and back pay would be binding on their successors in office and hence on the School District, itself. *Harkless v. Sweeny Independeni School District et al,* 427 F 2d 799 (5th Cir. -1970). This has in no way been vitiated by *City of Kenosha v. Bruno* 412 U. S. 507 (1972). See: *United Farm Workers of Florida Housing Project, Inc. v. City of Del Ray Beach,* 493 F 2d 799 (5th Cir. - 1974).

Petitioner has alleged as recoverable damages at law, $7,500.00 actual damages and an additional sum of $7,000.00 exemplary damages, all over and above back pay sought. Such *special damage* claims *if supported by proof,* are here recoverable. *Lucia v. Duggan,* 303 F. Supp. 112

(D. Mass-1969); cf. *Sparks v. Griffin*, 460 F. 2d 433 (5th Cir. 1972) at 443; *Williams v. Albemarle City Board of Education*, 508 F 2d 1242 (4th Cir. -1974) at 1244; *Smith v. Concordia Parish School Board*, 387 F. Supp. 887 (D. C. La. -1975), at 890 and 891.

In *Orr v. Trinter*, 444 F. 2d 122 (6th Cir. 1971) cert. denied 408 U. S. 943, is *summarized* the rationale here governing, as follows:

> " Initially we recognize that plaintiff does not have a right to public employment. *Cafeteria and Restaurant workers' Union, Local 473, v. McElroy*, 367 U. S. 886, *supra*. However, even though 'one may not have a contitutional right to go to Bagdad * * * the Government may not prohibit one from going there unless by means consonant with due process of Law.' *Homer v. Richmond*, 110 U. S. app. D. C. 226, 229, 292 F 2d 719, 722. Hence it is no longer open to debate that plaintiff would be entitled to relief if the board had refused to rehire him because he had exercised his rights as guaranteed by the free speech clause of the First Amendment, *Pickering v. Board of Education*, 391 U. S. 563, *Board of Trustees of Arkansas A & M College v. Davis*, 396 F 2d 730 (8th Cir.) Cert. denied 393 U. S. 962; by the self-incrimination clause of the Fifth Amendment, *Slochover v. Board of Higher Education*, 350 U. S. 551; by the due process clause of the Fifth or Fourteenth Amendments, *Greene v. McElroy* 360 U. S. 474; or by the equal protection clause of the Fourteenth Amendment, *Hatton v. County Board of Education*, 422 F. 2d 457 (6th Cir.); *Rolfe v. County Board of Education*, 391 F 2d 77 (6th Cir.). These are constitutionally impermissible reasons for refusal to rehire a teacher. Conversely courts have recognized as constitutionally permissible reasons for refusal to rehire the fact that the applicant is not as well qualified as another applicant, *Brooks v. School District*, 267 F 2d 733 (8th Cir) cert. denied 361 U. S. 894; . . ."
>
> (444 F 2d at 134)

6. *That even if* (as *was* indicated by Judge Godbold in his specially concurring opinion) *the condition of the U. S. District Court in its order of June 5, 1970 and affirmed by the Court of Appeals that Ball litigate in the state proceeding in a good faith adversary manner was not a barrier to litigation of his federal claims in federal court, Ball, with no choice, did comply fully with the stipulation in the order of June 5, 1970.*

From the statement of facts herein this court is aware that background is as follows:

(1) Gene Ball initially presented his difficulty to the State administrative system and was *vindicated* at its highest level, the Texas State Board of Education;

(2) Only after waiting well over two months *after* the State Board of Education had ruled in his favor, and *then* only after the respondents had resolved their indecision by *appealing* the administrative order in Ball's favor to the

State District court, did Ball file his Section 1983 action in U. S. District Court;

(3) When it became apparent that the U. S. District Court would not proceed with his Section 1983 action while respondents' appeal from the administrative order was pending in state district court, Ball filed pleading in the state court *asking the state court to rule against him*. This method of obtaining faster action on the merits of his Section 1983 action, had been suggested to initially approved by the U. S. District Judge at the conclusion of the March 20, 1970 hearing on Ball's application for temporary injunction;

(4) The U. S. District Court, however, then, and after petitioner had *implemented* his suggested solution: (1) ordered Ball to *show cause* why his Section 1983 action should not be dismissed if he intentionally sought adverse ruling in the state court rather than trying to win; and (2) on June 5, 1970 *dismissed* Ball's Section 1983 action, but without prejudice to re-instatement *provided Ball completed the administrative proceeding then pending in state court in a good faith adversary manner. ALL LITIGATION WHICH HAS FOLLOWED FOR THE PAST EIGHT AND ONE-HALF YEARS IN BOTH FEDERAL AND STATE COURTS HAS BEEN AIMED AT A SINGLE PURPOSE-REINSTATEMENT OF BALL'S SECTION 1983 ACTION.* In short,

to get back to the starting place. After the March 20, 1970 hearing on Ball's Application in U. S. District Court, there have been no further activities on the *merits* of Ball's Section 1983 action. The U. S. District Court has *never* at *any* subsequent time based *any* order on the *merits* of Ball's federal claims. On *two* occasions, where *procedural issues alone* were presented in *both* appeals, U. S. Court of Appeals has *entirely bypassed* the procedural issues solely before it and, in effect, has, on its own motion, granted summary judgment in favor of respondents *on the merits*. Had the U. S. Court of Appeals *not withdrawn* it's *first* such action (of December 17, 1970) and on May 4, 1971 substituted a rule 21 affirmance (during the five-month interval the Court was being *polled* by one of its judges for assembly *en-banc*) the case would then (unless this Court had granted certiorari) have died;

(5) The U. S. Court of Appeals *did* withdraw its opinion of December 17, 1970 and this Court (Mr. Justice Douglas dissenting) denied review by certiorari on October 12, 1971 of the Rule 21, (Local Rule 21 of U. S. Court of Appeals for Fifth Circuit) affirmance of the *conditional* order of June 5, 1970. Mr. Ball then, with no other choice if he was to *ever* be permitted to try his Section 1983 action in Federal court, entered the trenches in the state proceeding with the purpose of *winning*

the pending state administrative action – or, at worst, to perform in such a way as to later satisfy the U. S. District Court that the "good faith adversary manner" condition had been satisfied;

(6) The happenings in the state administrative proceeding, which required from October 12, 1971 until May, 1976 for final resolution, are detailed in the statement of facts herein. Determination by the U. S. District Court (by its order of February 23, 1972) that *appeal* to the Texas Court of Civil Appeals from adverse ruling of the State District Court was within the orbit of the "good faith adversary" performance required to satisfy the condition for reinstatement in its order of June 5, 1970 may be singled out as the *reason* the administrative proceeding required the extra four and one-half years. (This determination, however, was 100% consistent with the order of June 5, 1970, as *under Texas law* review of such an administrative order is governed in the Texas Court of Civil Appeals by the *identical three statutory tests* to which review in the state district court is limited. There was no basis, then, for *appeal* to the 5th circuit of the order of February 23, 1972 entered by the U. S. District Court. Ball had no choice but to comply by filing the requisite state appeal if he was to satisfy the condition for reinstatement of his Section 1983 action as stipulated in the order of June 5, 1970). In *both* de-

cisions of Texas Court of Civil Appeals (*Ball v. Kerrville* Independent School District, 504 S. W. 2d 791 (Tex. Civ. App. - 1973, err. ref n. r. e.) and *Ball v. Kerrville Independent School District*, 529 S. W. 2d 795 (Tex. Civ. App. - 1975, err. ref. n. r. e.)) is pointed out that Ball had *reserved* his federal claims [pursuant to *England v. Louisiana State Medical Examiners*, 375 U. S. 411 (1964)] from the state proceeding to be *preserved for later disposition in the U. S. District Court.* Progress in the case, after U. S. District Court interpreted its order of June 5, 1970 as *requiring appeal*, was less rapid than Mr. Ball would have preferred. Three frustrations were: (1) the *remand* after first appeal; (2) the full year required to dispose of motions for rehearing after first opinion of Court of Civil Appeals; and (3) the 5 months required to prepare statement of facts after second adverse decision in state district court. These are, of course, and were received as normal in course of litigation. *Unusual* only, was *to be litigating at all* where the *primary goal* could be *first even placed in issue* in *DIFFERENT LITIGATION* which *could commence only when and AFTER conclusion of the then current litigation.* Perhaps, partly in recognition of this, the Texas Court of Civil Appeals granted Ball's motion to expedite the second appeal to it immediately upon receipt of the record. Prime example of *Ball's effort throughout* to keep this litigation *moving* was

his petition filed March 19, 1975 to *mandamus* the state district judge to render judgment after second state district court trial. By decision rendered October 25, 1975 the Texas Court of Civils Appeals reversed the state district court and ordered unpaid salary for the 1969-70 school year, with interest, all that was or *could have been placed in issue* in the state administrative proceeding paid to Mr. Ball. Subsequently the Texas Supreme Court denied Respondents' application for writ of error and by May 10, 1976, though the mandate was not to issue until June, all matters about which question even might arise in the state administrative proceeding had been put to rest. It appeared that Mr. Ball had satisfied the condition for reinstatement of his Section 1983 action as stipulated in the U. S. District Court's order of June 5, 1970;

(7) In May of 1976, Ball petitioned the U. S. District Court for reinstatement of his Section 1983 action and for leave of court to file his third amended complaint supported by his seventh brief (all of which are reproduced in appendix to briefs filed in U. S. Court of Appeals). Ball asserted that success *down to the penny* as to all matters in issue or *which could have been placed in issue* in the state proceeding established beyond reach of argument that he had performed in a "good faith adversary manner" in the state proceeding as required.

> The U. S. District Court did not agree. By its order of November 19, 1976, it first *acknowledged* that under its order of June 5, 1970, Ball *could* have reinstated his Section 1983 action, *if* Ball had complied with the stipulation therein that he perform in a "good faith adversary manner". The U. S. District Court then concluded, however, that Ball had *not complied with the stipulation and denied reinstatement*. The express basis for the finding of the U. S. District Court that Ball had not complied with the stipulation of June 5, 1970 was that he had "deliberately withheld [from the State Court] his claim for reinstatement to the position he occupied before he was dismissed. . ." (Appendix B, pages A-13, A-14).

Ball's appeal to the U. S. Court of Appeals was based on dual assertions: (1) that in the posture of a statutory appeal from order of the Texas State Board of Education (as the state administrative appeal was *at all* times - from its filing on February 19,1970 until its final conclusion in June of 1976) the Texas Courts lacked *jurisdictional power* to entertain any such claim as the U. S. District Court on November 19, 1976 determined Ball to have "deliberately withheld"; and (2) that even if Ball had devised some method of causing the State courts to come to decision on such a claim, it *only* could have been based on assertion that the constitutional issues he had *reserved* under *England* from the state proceeding somehow *overrode* State Laws, which he would then have had to alleged to have been in conflict (they were not). For overview here of what required 23 pages of Ball's brief to the U. S. Court of Appeals, I take (2), above, first.

Axiomatic is that, while *England v. Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964) provides a *method* by which a litigant in state court may preserve federal claims for later determination by a federal court (by *reserving* such claims from the scope of the state proceeding, *should* the litigant so desire, this Court did *not* in *England*, intimate that the power to *choose* not remain entirely with the litigant. This choice afforded by *England* did not afford a litigant *two* bites at the apple, as does, for example, the habeas corpus exhaustion requirement, 29 U. S. C. A. Section 2254. Ball's only protection under *England* was his *power to choose.* Even assuming it to have been jurisdictionally possible in the state administrative proceeding to have placed his federal claim for reinstatement to his teaching position in litigation, Ball could only have done so by *election to litigate such federal claims fully in the state proceeding.* Such election would, however, constitute a *bar* rather than a *condition* to subsequent litigation of such federal issues in federal court. In the introductory paragraph to *Brown v. Chastain*, 416 F 2d 1012 (1969), the U. S. Court of Appeals for the Fifth Circuit explained:

> " We are here presented with the question whether the District Court had jurisdiction to directly review a **final determination of federal constitutional questions voluntarily submitted to and decided by the state courts of Florida* in connection with litigation pending in the state courts, no review by the U. S. Supreme Court having been sought. **The District Court had no jurisdiction and we reverse.*"
>
> (416 F 2d at 1013)

*emphasis supplied

Turning now to (1), above, even had Ball so elected to present his federal claims in the state proceeding, the state courts in this statutory appeal from an administrative order would have lacked jurisdictional power to have entertained them. Only in circumstances where *the administrative order, itself* creates right to relief in the teacher which could otherwise be lost, may counterclaim for relief under ordinary rules of evidence be considered in an administrative appeal under Section 13.115(c) Vernon's Annotated Texas Education Code. *Board of Trustees of Crystal City Independent School District v. Briggs*, 486 S. W. 2d 829 (Tex. Civ. App. - Beaumont, 1972, no writ).

That the administrative order, itself, did not create a right to reinstatement to his teaching position in Ball, an untenured teacher discharged at the commencement of his one-year teaching contract for the 1969-70 school year, *after the expiration date of his teaching contract* is clear. Ball's first appeal to the U. S. Court of Appeals and his first application to this Court for review by certiorari were based, in part, upon recognition of this jurisdictional limitation and *plea that the last class for the 1969-70 school year was already over on June 5, 1970,* when the U. S. District Court entered its order from which all subsequent events have emanated.

To, as quickly as possible, present overview of why the Texas State Board of Education lacked jurisdictional power to accomplish the feat attributed to it by the U. S. District Court, let it first be recognized that the Texas Constitution (Art. VII, Section 1) placed mandatory duty on the Texas *Legislature* to establish and maintain system of public free schools. While the State Board of Education is a constitutional body, its duties and *authority* are prescribed by the

Legislature. Article VII, Section 7, Texas Constitution. In summary, *powers* and duties of *all* component bodies of system of free public education in Texas exist by *virtue of statute* or not at all. *Moseley v. Dallas*, 17 S. W. 2d 36 (Tex. Comm. Apps - 1929) at 40; *Marrs v. Mathews*, 270 S. W. 586 (Tex. Civ. App. - Texarkana, 1925) *err. ref.*.

Under the Texas Education Code, control of education at the state level is vested in the Central Education Agency, which consists of the *State Board of Education*, the State Commissioner of Education and the State Department of Education. Sections 11.01, 11.02(a) Texas. Education Code. At the local level the management and control of schools is responsibility of local school district like the Kerrville Independent School District. Section 11.01 Texas Education Code. The *local school districts have exclusive power to hire and dismiss teachers.* Sections 23.26(b) and 23.28(a) (b) Texas Education Code.

Ball's teaching contract for the 1969-70 school year is for *one-year only.* In accordance with Article 2781, Texas Civil Statutes, the predecessor to Section 23.28 of the Texas Education Code, it commenced July 1, 1969, and terminated June 30, 1970. The Kerrville Independent School District has not adopted provisions of the probationary or continuing contract law as set out in Sections 21. 201 et seq of the Texas Education Code, which choice is vested in discretion of local school board. Opin., Texas Attorney General 1967, No. M-123; Sec. 23.28(e) Texas Education Code. Thus Mr. Ball was *without shelter under Texas Law in form of tenure.*

Even the local boards of trustees, in whom *exclusive power to contract with teachers is vested*, and who may *elect* to adopt optional statutory tenure plan, in *absence of such election* may *not* contract with teachers beyond the three year maximum term of contracts provided in Section 23.28 of the Texas Education Code. *Fikes v. Sharp*, 112 S. W. 2d 774 (Tex. Civ. App. - Austin, 1938, no writ history); *Fromen v. Goose Creek Independent School District*, 148 S. W. 2d 460 (Tex. Civ. App. -Galveston,1941, err. dism.); Hix v. *Tuloso-Midway Independent School District*, 489 S. W. 706 (Tex. Civ. App. -1972, err. ref. n.r.e.). Thus, while *academic* in view of the contract of *one-year's* duration actually entered into between Ball and respondents, it is interesting to note that even respondents, in whom the *exclusive power to contract is vested*, lacked *power* in the summer of 1969 to have entered into *any* contractual arrangement with Ball past June of 1972. Again, this is *academic* because of one-year agreement actually entered into, *but any such purported agreement would have been void.* I turn now to the State Board of Education.

The State Board of Education is a part of the *executive* branch of State Government. Even, when, as in Mr. Ball's case, it acts in a "*quasi-judicial*" role, it is serving in function as a part of the *executive* branch of government. *Whitmarsh v. Buckley*, 324 S. W. 2d 298, (Tex. Civ. App. - Houston, 1959) at 303. It's *jurisdictional power*, even when functioning *quasi-judicially*, is *limited to correcting abuse of discretion that could be legally exercised by lower school officials. Dallas v. Moseley*, 286 S. W. 497 (Tex. Civ. App. -Dallas, 1926) affirmed 17 S. W. 2d 36.

The classic statement of the jurisdictional powers and limitations of the State Board of Education when acting in a situation like Mr. Ball's is found in Chief Justice Alexander's opinion, in *Gragg v. Hill*, 58 S. W. 2d 150 (Tex. Civ. App. - Waco, 1933, err. ref.), as follows:

". . . The controversy between the training school and appellant arose over the manner in which appellant was performing his duties as a teacher. *There was no dispute about his having been employed nor as to the terms of his contract . . . (Consequently he was discharged. *The question which was before the State Board of Education was one of fact and not of law, relating to the internal affairs of the school and the efficient management thereof, and came within the purview of the matters committed by the legislature to such board for its determination and was therefore within the jurisdiction of such board. Harkness v. Hutcherson, 90 Tex. 383, 38 S. W. 1120; Brazoria Independent School District v. Weems, (Tex. Civ. App.) 295 S. W. 268, Paragraph 3; McCollum v. Adams, Tex. Civ. App.) 110 S. W. 526.

(58 S. W. 2d at 152)

*emphasis supplied

So the *jurisdictional power* of the State Board of Education is limited to *questions of fact* within the context of deciding whether or not there has been an abuse of discretion by lower school officials. See also: *Blair v. Board of Trustees, Trinity Independent School District*, 161 S. W. 2d 1030 (Tex. Civ. App. -Galveston, 1942) at 1034; *Underwood v. Sabinal Independent School District* 275 W. 267 (Tex. Civ. App. -San Antonio, 1925) at 267.

It follows that the reversal of the lower school officials by the State Board of Education in Mr. Ball's case is *subject to but one possible construction* - to reinstate Mr. Ball's

teaching contract and to *again vest in Mr. Ball the identical rights under his teaching contract* which had been taken away from him when his contract had been terminated on September 3, 1969. Even if such restored rights, however, included the right to teach as well as the right to be paid *classes were over on June 5, 1970, when the U. S. District Court entered its order from which all this has evolved.*

Respectfully submitted, then, is that the determination of the U. S. District Court in its order of November 19, 1976 that the effect of the order [of January 5, 1970] of the State Board of Education would have been to reinstate petitioner to the teaching position he occupied before he was dismissed *at a time after the completion of the contract period* was based upon a *clear misconception or misapplication of local law. Bookwalter v. Phelps*, 325 F 2 186 (8th Cir. 1963); *American National Bank of St. Paul v. National Indemnity Company of Omaha*, 22 F. 2d 513 (7th Cir. 1955). Axiomatic is that such cannot stand as basis for denial of federal jurisdiction.

Unforeseen by Mr. Ball on January 5, 1970, of course, was the reasoning this Court would later in *Kelley v. Johnson*, 425 U. S. 708 (1976). Should his Section 1983 action be remanded to U. S. District Court as he seeks, and should it be determined that, under applicable state law, the voice of the State of Texas with reference to his van-dyke beard be that of the State Board of Education (as was Suffolk County the voice of the State of New York in *Kelley*), rather than of respondents, additional benefit from the State Board's decision, unsuspicioned on January 5, 1970, could accrue.

7. *That disposition of this case by, in effect, summary*

judgment on the merits granted by the U. S. Court of Appeals on its own motion cannot be sanctioned on this record.

Prior to grant of certiorari by this Court in *Perry v. Sindermann*, 408 U. S. 593 (1972), summary judgment for failure to state a cause of action had been granted by the U. S. District Court, but reversed by the Court of Appeals, which had ordered remand to the trial court.

The background of Gene Ball's case, then, stands in sharp contrast to *Sindermann*. As noted earlier, a hearing *was* had in U. S. District Court, March 20, 1970, on petitioner's application for temporary injunction. By definition, the full-day's testimony then received in the trial court by witnesses called by petitioner and by respondents *did* relate to the *sustantive merits* of petitioner's *federal* allegations. And it was at the end of *this* day with *this* testimony fresh on its mind that, as noted earlier, the *trial* court made the *only* comments *it* was *ever* to make pertaining to the *substantive merits* of Gene Ball's federal allegations. On page 33 of the appendix to briefs in the Court of Appeals, the *trial* court observed:

> *"*Now if this had happened about the time the school year began, I don't think I would have been hesitant in granting a temporary injunction on the state of the record as it is now,* but what I am concerned about is the fact that we are toward the end of the school year."
>
> *emphasis supplied

And on page 36 is found the following statement of the *trial* court:

> *"*I think he has raised a serious constitutional issue in this case, a very serious issue, and I certainly do not want to do anything to deprive him of the right to litigate it in this court* if he feels that at some time he has not had full opportunity to do so in the state court. **but I do not think that in the meantime that I should interfere with the processes that are now in motion in the state court".*
>
> *emphasis supplied

After conclusion of this hearing at the end of the day, March 20, 1970, there has been *no further* activity relating to the *substantive merit* of Gene Ball's Section 1983 federal action, Revealed in *every* subsequent order issued by the *trial* court is that the *substantive merit* or lack of it of Gene Ball's *federal allegations formed no basis* for *any* order issued by the U. S. District Court, right down to and including the order of final dismissal issued November 19,1976.

Grant of certiorari here for purpose of *summary remand* to the *trial* court for development of the *facts* would not be *expansive* of this Court's *assumption* in *Kelley v. Johnson, supra*, that the, ". .citizenry at large has some sort of 'liberty' interest within the Fourteenth Amendment in matters of personnal appearance . . ." (425 U.S. at 244). cf. *Damico v. California*, 389 U. S. 416 (1967); *Sweetbriar Institute v. Button*, 387 U. S. 423 (1968); and recent summary remand of seventh circuit decision for application of *Mt. Healthy School District v. Doyle, supa.* burden of proof. Rather, it would be remaining in line with this court's earlier recognition in *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411 (1964), that:

"How the *facts are found* will often dictate the decision of federal claims."; and, "It is the *typical*, not the rare, case in which constitutional claims turn upon resolution of contested *factual* issues." (375 U. S. at 416, 417). Moreover, presented *here* could be the case where the *very existence* of a substantial federal question must depend upon *just where* in the broad spectrum of the "general contours" of the Fourteenth Amendment the *facts* are *determined* to *fall*. But *this determination*, and now coming full circle, is one *reserved*, at least initially, to the *trial* court.

Turning back now to the mechanics, applicable rules all auger in Mr. Ball's behalf. Petitioner's *factual allegations - which at this stage of the litigation* must be construed most favorably to him (*Sinderman*, 408 U. S. at 599) are that:

(1) Respondents *discharged* petitioner *during his contract term solely for his refusal to shave his van-dyke style beard* without justification or prior adverse experience in violation of petitioner's substantive rights to liberty and equal protection of the laws and in violation of his federally protected right to procedural due process, all as guaranteed by the Fourteenth Amendment;.

(2) The express reason given by respondents for such arbitrary action was that if petitioner were permitted to teach while wearing a beard it would make it more difficult to enforce a rule that students be clean shaven.

Two teachers were admittedly then teaching with mustaches although students were forbidden *all* facial hair. Such, even if deemed the withholding of a *privilege* rather than a right, is violative of the Equal Protection of the Laws Guarantee;

(3) While petitioner was, two weeks after his contract was *terminated in his absence*, afforded a "hearing" to "reconsider", respondents subsequent action in "reaffirming" its earlier termination of Mr. Ball's contract *found no possible basis of support in matters presented at the hearing.* Common Law of the Institution in the Kerrville Independent School District at times applicable was that if a teacher's contract *was not to be renewed*, the teacher would be so notified, reasons furnished, and the teacher afforded opportunity to reply before decision not to renew became final. Ball's teaching *contract* for the 1969-70 school year was *reinstated* by the Texas Board of Education on January 5, 1970, and was in *full force and effect at time of contract renewal in Spring of 1970.* Ball's discharge and failure of respondent's to follow their own procedure with regard to subsequent renewal contracts are violative of Ball's right guaranteed by the Procedural Due Process Clause of the Fourteenth Amendment. Moreover, Ball's standing in the community prior to termination of his contract on September 3, 1969 is exemplified by his having been: chairman of

Mathematics Department at Tivy High School; Adult sponsor for the Young Republicans of Kerr County; and an honorary kiwanian, by virtue of his community service with young people. The termination of his contract on September 3, 1969 severely damaged his reputation and standing in the community for years thereafter. Respondents hung on him a *"badge of infamy"* within the meaning of *Board of Regents v. Roth*, 408 U. S. 564 (1972). Special damages resulting from the violation of procedural due process are alleged;

(4) Respondent's refusal to renew Ball's teaching contract for the 1970-71 and subsequent school years was in *retaliation for Ball's exercise of protected freedoms* indicated in (1), (2) and (3) above; and

(5) Petitioner is entitled to reinstatement, back pay, and damages, both actual and exemplary, alleged to have resulted specially from respondent's alleged violations of Ball's federally protected rights, and over and above back pay, and costs, including reasonable attorney's fees.

Unless, therefore, and as a *matter of law* it can be said that *on any state of facts it can be* said that petitioner is entitled to *NONE* of the relief mentioned above, *then, this case is like Perry v. Sindermann, supra*, where this Court affirmed:

" In this case, of course, the respondent has yet to show that the decision not to renew his contract was, in fact, made in retaliation for his exercise of the constitutional right of free speech **The District Court foreclosed any opportunity to make this showing when it granted summary judgment.* Hence, we **cannot now hold that* the action of Board of Regents was invalid.

" But we agree with the Court of Appeals that **there is a genuine dispute as to 'whether the college refused to renew the teaching contract on an impermissible basis* - as a reprisal for the exercise of constitutionally protected rights.' 430 F 2d at 943. The respondent has alleged that his non retention was based on his testimony before legislative committees and his other public statements critical of the Regent's policies. And he has alleged that this public criticism was within the First and Fourteenth Amendments' protections of freedom of speech. **Plainly these allegations present a boni-fide constitutional claim.* For this Court has held that a teacher's public criticism of his superiors on matters of public concern **may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment. Pickering v. Board of Education, supra.*

" For **this reason we hold that the grant of summary* judgment against the respondent, **WITHOUT FULL EXPLORATION OF THIS ISSUE was improper.*"

(408 U. S. at 598)

*emphasis supplied

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in this case.

Respectfully submitted,

JOE MIKE EGAN, JR.
254 First National Bank Building
Kerrville, Texas 78028
Attorney for Petitioner

PROOF OF SERVICE

In furtherance of the rules, I certify that I have served three copies of the above petition for writ of certiorari upon MR. LAVERN D. HARRIS, Realty and Trust Building, Kerrville, Texas, sole counsel for all respondents.

This 2nd day of February, 1979. ..

JOE MIKE EGAN, JR.

APPENDIX A
Opinion of United States Court of Appeals

Gene BALL, Plaintiff-Appellant,

v.

BOARD OF TRUSTEES OF the KERRVILLE INDEPENDENT SCHOOL DISTRICT et al.,
Defendants-Appellees

No. 76-4456

United States Court of Appeals, Fifth Circuit

Nov. 20, 1978

Untenured high school teacher who was discharged for refusal to shave his beard filed a complaint under the Civil Rights Act of 1871. The United States District Court for the Western District of Texas, at San Antonio, Adrian A. Spears, J., dismissed the complaint, and plaintiff appealed. The Court of Appeals held that plaintiff failed to raise a substantial federal question and his suit was thus properly dismissed, since, having no right to reemployment, he had no due process right to a hearing as to the reasons for his dismissal, and since the claim that the school board's action denied him a "liberty interest" was wholly insubstantial and frivolous.

Affirmed.

Godbold, Circuit Judge, filed a specially concurring opinion.

1. Federal Courts 244

Untenured high school teacher, who was discharged for refusal to shave his beard and who filed suit under the Civil Rights Act of 1871, failed to raise a substantial federal question and his suit was thus properly dismissed, since, having no right to reemployment, he had no due process right to a hearing as to the reasons for his dismissal, and since the claim that school board's action denied him a "liberty interest" was wholly insubstantial and frivolous. 42 U.S.C.A. § 1983; U.S.C.A. Const. Amend. 14.

2. Schools and School Districts 133.15

Reemployment of untenured high school teacher, who was employed under a one-year contract, could be refused for any reason or for no reason at all.

3. Constitutional Law 255(2)

A due process claim for violation of a "liberty interest" entitling plaintiff, an untenured high school teacher who was discharged for refusal to shave his beard, to a full hearing would arise if, and only if, the reason given or the dismissal procedure resulted in a "badge of infamy," public scorn, or the like. U.S.C.A. Const. Amend. 14.

4. Constitutional Law 255(2)

As regards a due process claim for violation of a "liberty interest," it is clear that choosing to wear a beard rather than be clean shaven, or disapproval of either choice, has no effect on a man's profession or his ability to earn a livelihood. U.S. C.A. Const. Amend. 14.

Appeal from the United States District Court for the Western District of Texas.

Before GODBOLD, SIMPSON, and MORGAN, Circuit Judges.

PER CURIAM:

This appeal represents one of various stages of litigation in which the appellant Ball has sought judicial relief from his disemployment at the hands of the Board of Trustees of the Kerrville Independent School District. The discrete question on appeal is whether the district court erred in dismissing the appellant's suit for reinstatement. Although relying upon a different methodology, we affirm the judgment of the lower court.

Because an exhaustive recital of procedural and legal history of this case would be exhausting, only those that are pertinent will be forced on the reader. Appellant had taught at the Tivy High School in Kerrville, Texas for six years continuously prior to the 1969-1970 school year. His one year contract for the 1969-1970 school year was terminated, however, on September 3, 1969 for his refusal to shave a Van Dyke beard. Appellant pursued his administrative remedies to the State Board of Education before whom he was successful. The Kerrville Independent School District elected to continue the administrative procedure by appealing the decision of the State Board to the District Court of Kerr County. Immediately upon notice of the district appeal, appellant filed a §1983 action against appellees claiming that appellees abridged appellant's fourteenth amendment right of liberty and equal protection. As relief, appellant sought both money damages under the contract and reinstatement. The district

court, taking notice of the pending state action, dismissed, directing appellant to seek his relief in the state proceeding in a good faith adversary manner. The dismissal was expressly made without prejudice and the appellant was invited to reinstate whatever federal claim remained after the state proceedings. This court affirmed the dismissal and the Supreme Court refused to grant certiorari. *Ball v. Board of Trustees, Kerrville Ind. School District*, 442 F.2d 408 (5th Cir.), *cert. denied*, 404 U.S. 865, 92 S.Ct. 58, 30 L.Ed.2d 108 (1971). Appellant returned to the state machinery and was ultimately successful in receiving his money damages. He did not ever press his claim for reinstatement, however. Because of this failure, the district court determined that appellant did not litigate his claim in good faith in state court and declined to reinstate federal jurisdiction by dismissing appellant's renewed § 1983 complaint. Appellant then timely appealed the dismissal to this court.

[1,2] The district court dismissed this suit based upon the appellant's failure to submit his entire claim to state determination. In sustaining this dismissal, we find that the appellant failed to raise a substantial federal question. The employment of Ball, an untenured high school teacher employed under a one-year contract at Tivy High School was terminated by the Trustees of the Kerrville Independent School District. The assigned reason was his refusal to shave his Van Dyke beard. Of course, reemployment could be refused, for any reason, or for no reason at all. Having no right to reemployment he had no due process right to a hearing as to the reasons for dismissal. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); *Perry v. Sindermann*, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972).

[3] A due process claim for violation of a "liberty interest" entitling Ball to a full hearing would arise if -- and only if -- the reason given or the dismissal procedure adopted resulted in a "badge of infamy," public scorn, or the like. *Paul v. Davis*, 424 U.S. 693, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976); *Dennis v. S & S Consolidated School District*, 577 F. 2d 338, 340-341 (5th Cir. 1978); *Kaprelian v. Texas Woman's University*, 509 F.2d 133, 139 (5th Cir. 1975).

[4] But public knowledge that Ball's refusal to shave his beard clearly bore no such taint. It is clear beyond cavil that choosing to wear a beard rather than be clean shaven -- or disapproval of either choice -- has no effect on a man's profession or his ability to earn a livelihood. State administrative procedures resulted in Ball's being paid his salary in full for the term of his employment. No other or further redress at the hands of the Board of Trustees or its individual members may be had under 42 U.S.C. § 1983, or under any accepted concept of federal constitutional rights. Ball urgently insists on appeal that his federal claim should not have been dismissed below without an opportunity for full hearing. Assuming *arguendo* the academic correctness of this proposition, the claim of violation of a liberty interest by the Board's action is "wholly insubstantial and frivolous." Federal courts do not sit to entertain such claims.

"Lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from previous decisions of [the Supreme Court] as to foreclose the subject." *Mays v. Kirk*, 414 F.2d 131, 135 (5th Cir. 1969), quoting from *California Water Service Co. v. City of Redding*, 304 U.S. 252, 58 S.Ct. 865, 867, 82 L.Ed. 1323 (1938).

This two-pronged test is fully met here.[1] The district court is

AFFIRMED.

GODBOLD, Circuit Judge, specially concurring:

I agree that the district court did not commit reversible error in refusing to reinstate Ball's federal cause of action, but my reasons are different from that stated by the majority.

My colleagues approach this as just another "hair case" and hold that Ball has raised no substantial federal question, that is, no cause of action. This is a ground different from that of the trial court and it was not urged by appellees on this appeal and neither briefed nor argued.[1] The majority

1. For a recent application of the "wholly unsubstantial and frivolous" doctrine as warranting dismissal, see *Southpark Square Limited, etc. v. City of Jackson, Mississippi,* 565 F.2d 338, 341-42 (5th Cir. 1978).

1. Additionally, in Ball's earlier appeal this court initially gave the same ground (though in different words: "Ball has not demonstrated that he has any Federally protected right which has been violated") as the basis for affirming the district court's order in which it had abstained pending Ball's pursuit of state court remedies. *Ball v. Bd. of Trustees of Kerrville Indep. School Dist.,* 434 F.2d 1040 (C.A.5, 1970). Then, on petition for rehearing, the court withdrew that opinion and substituted a Rule 21 affirmance. *Ball v. Bd. of Trustees of Kerrville Indep. School Dist.,* 442 F.2d 408 (C.A.5), *cert. denied,* 404 U.S. 865, 92 S. Ct. 58, 30 L.Ed. 2d 108 (1971). The court's withdrawal of its initial opinion was neither res judicata nor law of the case. But, to say the least, it is unfortunate judicial administration to recede from the stated ground of decision that plaintiff has no cause of action, decide the case under the unrevealing cloak of Rule 21, and then years later, in a second appeal and after plaintiff has attempted repeatedly and unsuccessfully to get his claim heard in federal court, disinter the ground previously withdrawn and notify the plaintiff that all along he never had a federal cause of action at all.

decide the due process issue but do not purport to address or reach the equal protection claim which they acknowledge Ball asserted.

This court has decided that "hair regulation" cases brought by high school students do not rise to constitutional dimension. *Karr v. Schmidt,* 460 F.2d 609 (C.A.5) (en banc), *cert. denied,* 409 U.S. 989, 93 S.Ct. 307, 34 L.Ed.2d 256 (1972). In *Lansadle v. Tyler Junior College,* 470 F.2d 659 (C.A.5, 1972) (en banc), *cert. denied,* 411 U.S. 986, 93 S.Ct. 2268, 36 L.Ed.2d 964 (1973), we reached the opposite conclusion for college students. In *Hander v. San Jacinto Junior College,* 519 F.2d 273 (C.A.5, 1975), *opin. aff'd on petit. for reh.,* 522 F.2d 204 (C.A.5, 1975), we applied *Lansdale* to a college-level teacher. So far as I can determine this court has never ruled on whether a teacher at the high school level may have an equal protection claim of constitutional dimension arising from discrimination against him based upon his having a beard or upon the length of his hair. Since the above cases from this circuit were decided the Supreme Court in *Kelley v. Johnson,* 425 U.S. 238, 96 S.Ct. 1440, 47 L.Ed. 2d 708 (1976), upheld the dismissal of the claim of a policeman attacking on Fourteenth Amendment grounds a police department regulation controlling hair length, mustaches, beards and wigs. The county government did not prevail, however, on the ground that the policeman's claim was not of constitutional dimension but rather upon the ground that there was a rational relationship between the regulation and promotion of safety of persons and property through the means of a police department.[2]

2. In reaching this determination the Court considered factors bearing upon the government's right to make choices concerning organization, dress and equipment of policemen, such as the desire to make policemen readily recognizable to the public through their uniformity of ap-

Ball would be entitled to his day in court on the equal protection claim unless there is some barrier. The order of the district court, denying Ball's motion to reinstate his federal case on the ground that he had not litigated in the state proceedings in a good faith adversary manner, is not a barrier.[3] But there is another barrier. Ball's claims have been vindicated in state court to the extent they are not patently illusory. He had a one-year contract for the 1969-70 school year, and no tenure. On this appeal he only urges a right to reinstatement because his contract was terminated for a reason not constitutionally acceptable.[4] On the second state appeal the Court of Civil Appeals granted Ball his full salary for the 1969-70 school year, with interest.[5] One can speculate that if

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(Footnote 2 - continued)

pearance, and the desire for esprit de corps which such similarity might inculcate in the officers. It hardly seems possible that such considerations apply to a high school teacher, but in any event this would be an issue for a trial court to address and decide.

3. As he was entitled to do where the federal court had invoked *Pullman* abstention (*Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941)), pursuant to *England v. Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), Ball reserved this federal issues for later determination in federal court. Stripped to its essentials, the approach of the federal district court effectively overrode *England* under the rubric of requiring Ball to litigate in state court in a good faith adversary manner. Abstention, a neutral concept of standing aside while the state acts, was converted into an affirmative requirement of exhausting state remedies as a prerequisite to federal jurisdiction.

4. But it is plain that if the district court declared he has such a right, Ball would claim back pay for the period from the 1970-71 school year to the date of judgment (less earnings elsewhere).

5. *Ball v. Kerrville Indep. School Dist.*, 529 S.W.2d 792 at 795 (Tex. Civ.App. 1975, *error ref'd*, n.r.e.).

Ball had been reinstated immediately upon filing his federal suit, then when contract renewal time came in March 1970 the school board might have renewed his contract for the 1970-71 school year, and then in March 1971 for another year, and so on until the present. On the facts of this case, the theory blinks at reality. In January 1970 the State Board entered its order, overturning the purported termination of Ball's contract. Thereafter Ball informed the school board that he desired to resume teaching. In January and February 1970 the school board considered Ball's case at its meetings but took no action on either back pay or reinstatement. On February 17, it appealed the State Board's order to the state trial court. At contract renewal time in 1970, and for six years thereafter, the school board and Ball were locked in mortal combat over whether he had been validly discharged. Under these circumstances the state court's judgment for salary for the 1969-70 school year was full vindication for such rights as were not illusory. The federal district court was not required to crank up the federal judicial machinery to enter a declaratory order that Ball was entitled to reinstatement in 1970 but not entitled to relief because he has been paid by a state court judgment for the full period that, in all good sense, his reinstated status would have lasted.

Order Overruling Motion for Rehearing

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Edward W. Wadsworth
Clerk

Tel. 504-589-6514
600 Camp Street
New Orleans, La. 70130

Office of the Clerk
December 20, 1978

TO ALL PARTIES LISTED BELOW:

NO. 76-4456 - GENE BALL v. BOARD OF TRUSTEES OF THE KERRVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.

Dear Counsel:

This is to advise that an order has this day been entered denying the petition ( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the petition ( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,
EDWARD W. WADSWORTH,
Clerk
By: s/ Sally Hayward
Deputy Clerk

cc: Mr. Joe Mike Egan, Jr.
Mr. Lavern D. Harris

Judgment of Circuit Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 76-4456

D. C. Docket No. SA-70-CA-88

GENE BALL,
Plaintiff-Appellant,

versus

BOARD OF TRUSTEES OF THE KERRVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

Appeal from the United States District Court for the Western District of Texas

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that the plaintiff-appellant pay to defendants-appellees the costs on appeal, to be taxed by the Clerk of this Court.

November 20, 1978

Godbold, Circuit Judge, specially concurring.

Issued As Mandate:

APPENDIX B

Order Denying Petition for Reinstatement and for Leave To File a Third Amended Complaint

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL

v. CIVIL ACTION NO. SA 70 CA 88

BOARD OF TRUSTEES OF THE KERRVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.

ORDER DENYING PETITION FOR REINSTATEMENT AND FOR LEAVE TO FILE A THIRD AMENDED COMPLAINT

On this the 19th day of November, 1976, came on for consideration Plaintiff's petition for reinstatement of this cause to active status on the docket of this Court and for leave to file a third amended complaint; and it appearing to the court that Plaintiff initially chose to pursue his claim in the State System; that on the 5th day of June, 1970, this Court dismissed this cause without prejudice to Plaintiff's right to petition for reinstatement after completion of the administrative proceedings pending in the State Court in a good faith adversary manner;[1] and it further appearing that in the State Court Plaintiff deliberately withheld his claim for reinstatement to the position he occupied before he was dis-

missed (the remedy he seeks in this Court) despite the fact that under Texas law the effect of the order of the State Board of Education would have been to afford him that relief,[2] thus fully demonstrating his failure to complete the administrative proceedings in a good faith adversary manner as required; it is, therefore,

ORDERED that Plaintiff's said Petition for reinstatement of this cause to active status on the docket of this Court and for leave to file a third amended complaint be and the same is hereby DENIED.

Entered this the 19th day of November, 1976.

s/ Adrian A. Spears
ADRIAN A. SPEARS
UNITED STATES DISTRICT JUDGE

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1. This order was affirmed in an opinion of the Court of Appeals dated December 17, 1970. However, that opinion was withdrawn on May 4, 1971, at which time the judgment of this Court was again affirmed.

2. *HARKNESSv. HUTCHERSON*, 90 Tex. 383, 38 S. W. 1120, (1897); *RAMOS v. GUERRA*, 311 S. W. 2d 869 (Tex. Civ. App. - San Antonio 1953, no writ); *GRAGG v. HILL*, 58 S. W. 2d 150 (Tex. Civ. App. - Waco 1933, writ ref'd); *BRAZORIA INDEPENDENT SCHOOL DISTRICT v. WEEMS*, 295 S. W. 268 (Tex. Civ. App. - Galveston 1927, no writ). IN at least one case, it is apparent that the individual was reinstated after the completion of the contract period. *UNDERWOOD v. SABINAL INDEPENDENT SCHOOL DISTRICT*, 275 S. W. 267 (Tex. Civ. App. - San Antonio 1925, no writ).

APPENDIX C

Order Denying Temporary Injunction

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL

v.

CIVIL ACTION
SA 70 CA 88

BOARD OF TRUSTEES OF THE KERRVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.

ORDER DENYING TEMPORARY INJUNCTION

On the 20th day of March, 1970, came on for consideration the Plaintiff's motion for temporary injunction; and the Court having fully considered the pleadings, the evidence, the briefs and the arguments of counsel, is of the opinion that the motion for temporary injunction should be and the same is hereby DENIED.

It is further ordered that a hearing on the merits herein will be set immediately after the completion of the administrative proceedings now pending in the Second 38th District Court of Kerr County, Texas.

Entered this 23rd day of March, 1970.

s/ Adrian A. Spears
ADRIAN A. SPEARS
UNITED STATES DISTRICT JUDGE

Order to Show Cause

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL

V.

BOARD OF TRUSTEES OF THE
KERRVILLE INDEPENDENT SCHOOL
DISTRICT, HENRY H. WIED CIVIL ACTION
MARGARET WATSON, DAN W. BACON, NO. SA 70 CA 88
MAURICE HAUFLER, EARL A.
COCHRANE, PAT BRADEN AND
C. H. BORCHERS, MEMBERS OF
THE BOARD OF TRUSTEES, INDI-
VIDUALLY AND IN THEIR OFFICIAL
CAPACITIES

ORDER TO SHOW CAUSE

On this the 13th day of May 1970, it appearing that on March 23, 1970 this Court denied Plaintiff's motion for temporary injunction and ordered *that a hearing on the merits herein will be set immediately after the completion of the administrative proceedings now pending in the Second 38th District Court of Kerr County, Texas"; and

It further appearing that on May 1, 1970 Plaintiff filed his "First Amended Complaint", accompanied by his "Sixth Brief", to which was attached a copy of a "Second Amended

Answer" filed by Plaintiff as Appellee in Cause No. 6405, in said Second 38th District Court of Kerr County, Texas, in which Second Amended Answer Plaintiff seeks to withdraw his peas in abatement and/or motions to dismiss number one and two, and invites the State Court to dispose of the pending litigation adversely to him; and

It further appearing that the course being pursued by Plaintiff in the State Court is contrary to the spirit, if not the letter, of this Court's order of March 23, 1970, which contemplated a good faith attempt on Plaintiff's part to complete the proceedings in the State Court in an adversary manner; and

It further appearing that in and by the order of March 23, 1970 this Court acknowledged its intention to hold a hearing on the merits of this cause in order to consider any federal claims remaining after completion of the administrative proceedings in the State Court; and

It further appearing that the Supreme Court of the United States, in *ENGLAND v. LOUISIANA STATE BOARD OF MEDICAL EXAMINERS*, 375 U.S. 411 (1964), recognized that a party may retain his right to pursue his federal claims in Federal Court by the simple expedient of informing the State Court "that he intends, should the State Courts hold against him on the question of state law, to return to the District Court for disposition of his federal contention"; and

It further appearing that proper court administration, and the preservation of the delicate balance between the State and Federal Courts, demand that the lawsuit now pending in the Second 38th District Court of Kerr County, Texas, be completed as a good faith adversary proceeding; it is, therefore,

ORDERED that not later than Wednesday, May 20, 1970, the Plaintiff shall show cause in writing,with a copy to opposing counsel, why, in the event he either fails or refuses to contest the cause pending in the State Court in a good faith effort to win it, this cause should not be dismissed for failure and/or refusal to exhaust the administrative remedies available to him in State Court, in a faithful and effective manner.

Within five (5) days thereafter, defendants are directed to reply thereto in writing, with a copy to opposing counsel.

Entered this 13th day of May 1970.

s/ Adrian A. Spears
ADRIAN A. SPEARS
UNITED STATES DISTRICT JUDGE

Order of Dismissal

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL

V.

BOARD OF TRUSTEES OF
KERRVILLE INDEPENDENT SCHOOL
DISTRICT, ET AL.

ORDER OF DISMISSAL

On this the 5th day of June, 1970, came on to be considered the Court's order entered herein on May 13, 1970, requiring Plaintiff to show cause in writing why, in the event he either fails or refuses to contest the cause pending in the State Court in good faith effort to exhaust the administrative remedies available to him in State Court, in a faithful and effective manner. Having considered said order, together with the responses and briefs by the parties herein, along with Plaintiff's representation of his intention not to exhaust said administrative remedies, this Court is of the opinion that Plaintiff has failed to show cause why this case should not be dismissed. It is, therefore,

ORDERED, ADJUDGED and DECREED that this cause is and it is hereby dismissed, without prejudice, however, to Plaintiff's right to petition the Court for reinstatement of this cause for the purpose of this cause for the purpose of

considering any federal claims remaining after completion of the administrative proceedings pending in the State Court; provided such administrative proceedings are completed by Plaintiff in a good faith adversary manner.

SO ORDERED this 5th day of June, 1970 at San Antonio, Texas.

s/ Adrian A. Spears
ADRIAN A. SPEARS
UNITED STATES DISTRICT JUDGE

Per Curiam

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 30063

GENE BALL,
Plaintiff-Appellant

versus

BOARD OF TRUSTEES OF KERRVILLE
INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

(December 17, 1970)

Before JONES, GEWIN and CLARK, Circuit Judges.

PER CURIAM: The Appellant, Gene Ball, has not demonstrated that he has any Federally protected right which has been violated. The judgment of the district court is AFFIRMED.

Petition for Rehearing and Petition for Rehearing En Banc

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 30063

GENE BALL,
Plaintiff-Appellant

versus

BOARD OF TRUSTEES OF KERRVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellees

(May 4, 1971)

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING EN BANC

Before JONES, GEWIN and CLARK
CIRCUIT JUDGES

PER CURIAM: The opinion originally issued in this case is hereby withdrawn and the following opinion is substituted therefore:

Judgment AFFIRMED. See Local Rule 21.[1]

The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of

1. See: NLRB v. AMALGAMATED CLOTHING WORKERS OF AMERICA, 430 F 2d 966 (5th 1970).

the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is also DENIED.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D. C. 20543

October 12, 1971

E. Robert Seaver
Clerk of the Court

Joe Mike Egan, Jr., Esq.
401 Junction Highway
Kerrville, Texas 78028

Re: GENE BALL v. BD. OF TRUSTEES OF KERRVILLE INDEPENDENT SCHOOL DISTRICT, ET AL., No. 70-199.

Dear Sir:

The Court today denied the petition for a writ of certiorari in the above-entitled case. Mr. Justice Douglas is of the opinion that certiorari should be granted.

Very truly yours,

E. Robert Seaver, Clerk

By

/s/
Assistant Clerk

Lavern D. Harris, Esq.
Realty and Trust Bldg.
Kerrville, Texas 78028

AIRMIAL

Order

FILED
Feb. 18, 1972
Dan W. Benedict, Clerk
by. s/ Frances Mosley
Deputy

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL

V. CIVIL ACTION

BOARD OF TRUSTEE OF KERRVILLE ISD NO. SA 70 CA 88

ORDER

On this the 18th day of February, 1972, came on to be considered Plaintiff's motio: for leave to file information to the Court and petition for re-instatement of this cause to inactive status, and it appearing that the provisions of this Court's order of June 5, 1970, requiring that administrative proceedings pending in the state court be completed by plaintiff in a good faith adversary manner, have not been satisfied, it is ORDERED that the motion to file said information and petition for re-instatement be, and the same is hereby, in all things, DENIED, without prejudice, however, to plaintiff's right to petition the Court for re-instatement of this cause for the purpose of considering any federal

claims remaining after completion of the administrative proceedings pending in the state Court; provided such administrative proceedings are completed by plaintiff in a good faith adversary manner.

Dated this 18th day of February, 1972.

s/ Adrian A. Spears
United States District Judge

Order Denying Motions for Leave to File Petition for Reinstatement and Second Amended Complaint

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL

V. CIVIL ACTION

BOARD OF TRUSTEES OF THE KERRVILLE INDEPENDENT SCHOOL DISTRICT, ET AL. NO. SA 70 CA 88

ORDER DENYING MOTIONS FOR LEAVE TO FILE PETITION FOR REINSTATEMENT AND SECOND AMENDED COMPLAINT

On this the 23rd day of February, 1972, came on for consideration Plaintiff's motions for leave to file petition for reinstatement and second amended complaint, and it appearing that the provisions of this Court's order of June 5, 1970, requiring that administrative proceedings pending in the State Court be completed by Plaintiff in a good faith adversary manner, still have not been satisfied, since it is clear that Plaintiff has not exhausted his rights of appeal from the order of the State District Court, dated February 18, 1972. See Tex. Ed. Code Ann. # 21,215(d). In this connection, Plaintiff's attention is called to the opinion of Mr. Justice Black in *KARR v. SCHMIDT*, 401 U. S. 1201 (Feb. 11, 1971), in which he said, in part:

"The only thing about it that borders on the serious to me is the idea that anyone should think the Federal Constitution imposes on the United States Courts the burden

of supervising the length of hair that public school students should wear. The records of the federal courts, including ours, show a heavy burden of litigation in connection with cases of great importance - the kind of litigation our courts must be able to handle if they are to perform their responsibility to our society. Moreover, our Constitution has sought to distribute the powers of government in this Nation between the United States and the States. Surely the federal judiciary can perform no greater service to the Nation than to leave the States unhampered in the performance of their purely local affairs. Surely few policies can be thought of in which States are more capable of deciding than the length of the hair of school boys. There can, of course, be honest differences of opinion as to whether any government, state or federal, should as a matter of public policy regulate the length of haircuts, but it would be difficult to prove by reason, logic, or common sense that the federal judiciary is more competent to deal with hair length than are the local school authorities and state legislatures of all our 50 states. Perhaps if the courts will leave the States free to perform their own constitutional duties they will at least be able successfully to regulate the length of hair their public school students can wear."

In view of the foregoing, it is ORDERED that Plaintiff's said motions be and the same are hereby DENIED.

Entered this 23rd day of February, 1972 at San Antonio, Texas.

s/ Adrian A. Spears
ADRIAN A. SPEARS
UNITED STATES DISTRICT
JUDGE

APPENDIX D

Plaintiff's Third Amended Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

GENE BALL,
Plaintiff

vs. SA 70 CA 88

BOARD OF TRUSTEES OF THE KERRVILLE INDEPENDENT SCHOOL DISTRICT, HENRY H. WIED, MARGARET WATSON, DAN W. BACON, MAURICE HAUFLER AND EARL A. COCHRANE AND PAT BRADEN AND C. H. BORCHERS, MEMBERS OF THE BOARD OF TRUSTEES, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,
Defendants

Submitted for filing May 21, 1976
Leave to file - Denied
November 19, 1976

PLAINTIFF'S THIRD AMENDED COMPLAINT

This is an action in equity and at law to redress the deprivation under color of the laws of the State of Texas of rights, privileges and immunities secured by the First and Fourteenth Amendments to the United States Constitution. Juris-

diction of this Court is invoked pursuant to 28 U.S.C. 1331 and 28 U.S.C., 1343 (3) and (4) as authorized by 42 U.S.C., 1983 and of 28 U.S.C., 2201 and 2202. This is an action for declaratory judgment and an injunction to prevent the further deprivation under color of the State Law, statute, ordinance, regulation, custom or usage of rights, privileges and immunities secured by the Constitution of the United States, as made applicable to the States by the Fourteenth Amendment, guaranteeing to all persons freedom of speech, liberty, due process of law, and equal protection of the laws. Plaintiff seeks re-instatement to his teaching position, back pay, damages (both actual and exemplary), reasonable attorneys fees and his costs. At issue in this action is the right of the Plaintiff to wear a Van Dyke style beard (under facts and circumstances here material) according to his tastes and desires, but to be trimmed neatly and cared for in such manner as to constitute no possible hazard to health, while performing his teaching duties at the Tivy High School in Kerrville, Texas.

PLAINTIFF

2. Plaintiff GENE BALL is a citizen of the United States and resides in Cody, Wyoming.

DEFENDANTS

3. The Board of Trustees, the governing body of the Kerrville Independent School District, has power to manage and govern the schools in the district pursuant to Article 2780, V.A.C.S. In matters merely incidental to routine management and control of internal affairs of School, such as presented by Van Dyke beards on teachers, the Texas Legislature has adopted policy by keeping such matters in the hands of those knowledgeable in school matters. This social policy is implemented by vesting initial power of decision in such matters in local board of Trustees (Defendants) with final review and decision vested in Texas State Board of Education in such routine school matters and *very limited power vested in Courts of General Jurisdiction to overturn decisions made by the Texas State Board of Education in School matters.* Hence, while defendants necessarily act under color of State Law, the interests of the State are necessarily declared by the Texas State Board of Education in a school matter within their jurisdiction, such as here, upon which they have passed judgment.

4. Henry H. Wied, Margaret Watson, Dan W. Bacon, Pat Braden, Earl A. Cochrane, Maurice Haufler and C. H. Borchers were members of the Board of Trustees at times material to this complaint. All reside in Kerr County, Texas.

5. Each Defendant is sued in his or her official and individual capacities.

STATEMENT OF FACTS

6. Plaintiff, prior to the 1969-70 school year, had taught mathematics at the Tivy High School in Kerrville, Texas. He was awarded a contract to teach in the same assignment during 1969-70. He was chairman of the Mathematics Department at Tivy High School at the time of his suspension.

7. On the morning of Friday, August 29, 1969, he reported for duty wearing a Van Dyke style beard. He that morning attended the orientation and building faculty meetings,

after which he was notified by the high school principal to report to the superintendent.

8. The superintendent directed Plaintiff to shave his beard before reporting to teach the following Tuesday. Plaintiff declined, and was advised by the superintendent that he was suspended until he did so.

9. On the first day of classes (Tuesday, September 2, 1969) Plaintiff presented himself to teach, wearing his Van Dyke beard. He was advised that he was still under suspension. By letter dated that day he was officially notified in effect that:

(1) He was suspended;

(2) It would be recommended to the Board of Trustees that his contract be terminated, unless he shaved his beard.

(3) That Plaintiff could appeal the Superintendent's action to the Board of Trustees.

10. A special meeting of the Defendant Board was called on September 3, 1969, to consider the termination of Plaintiff's contract. Plaintiff was invited to attend. Plaintiff offered to come and answer any questions if he could have assurance that his attendance at the meeting on such short notice would not constitute complete fulfillment of the Superintendent's promise of an appeal to the Board and forfeiture of his rights to later hearing, after he had time to prepare. Receiving no such assurance, Plaintiff did not attend. The Board voted (6 - 0) at such meeting to terminate Plaintiff's contract. Plaintiff retained counsel the next morning, September 4, 1969.

11. Plaintiff requested and was granted opportunity for a hearing before the Defendant Board for the purpose of reconsidering the termination of his contract. Such meeting, attended by Plaintiff with counsel, was held as an open forum, on September 15, 1969. No decision was made at that time, but the Board announced they would take the matter under advisement. In closed session meeting, held September 23, 1969, they affirmed (7 - 0) their earlier action in terminating Plaintiff's contract, but approved payment of salary to Plaintiff, for the month of September only. Based upon matters presented to Defendants September 15, 1969, of which a written transcript was made and preserved, Defendants decision of September 23, 1969 was wholly arbitrary and without rational basis in the evidence heard and preserved.

12. Plaintiff promptly filed appeal to the Commissioner of Education for the State of Texas, Dr. J.W. Edgar. Hearing was held by the Commissioner on November 19, 1969. By decision rendered December 11, 1969, the Commissioner found the Board of Trustees to have been justified in terminating Plaintiff's contract.

13. Plaintiff appealed the action of the Commissioner to the State Board of Trustees. After a hearing of the appeal, held before the State Board on January 5, 1970, the State Board of Trustees overruled the decision of the Commissioner. As indicated in paragraph 3, while Defendants are acting under color of state law, it was as a matter of law on January 5, 1970 that the interest and aims of the State were

declared.

14. Defendant Board indicated that it would take no action with respect to the finding of the State Board of Education that the termination of Plaintiff's contract had been wrongful, until their regular scheduled meeting, January 15, 1970. Plaintiff did not attend this meeting but had offered to attend at the pleasure of the Board. At the January 15th meeting Defendant Board again deferred taking action, indicating that they needed further clarification as to (1) what the State Board had done and (2) what the Plaintiff was seeking.

15. Defendant Board refused to again consider Plaintiff's situation until its next regularly scheduled meeting over a month later on February 17, 1970. Plaintiff attended this meeting. Counsel were present for both Plaintiff and Defendants. From the inception of the difficulty and consistently to this point (as well as after and until the present date) Plaintiff has indicated to Defendants that *re-instatement to his teaching position was the single aspect of the controversy not amenable to dilution.* At the inception of the difficulty denial of his right to perform as a teacher was the *only aspect of the controversy.* On the fourth day (from memory) after Plaintiff retained counsel, and prior to the open hearing held September 15, 1969, copies of full decisions rendered in each case cited in Plaintiff's First Brief were delivered to counsel for Defendant. These same authorities had been placed before this Court in Plaintiff's First Brief prior to hearing had March 20, 1970, at which the Court commented from the bench:

> "Now if this had happened about the time the School year began, I don't think I would have been hesitatnt in granting a temporary injunction on the state of the record as it is now, but what I am concerned about is the fact that we are toward the end of the school year."
>
> (S. F. - 169)

Further, Defendants were made aware practically from the very outset in September, 1969, that *if judicial* action became unavoidable such action would be initiated by Plaintiff in the *Federal* Court. Even as late as the February 17, 1970 meeting, Plaintiff was re-iterating to Defendants his extreme reluctance to institute judicial action. At the conclusion of the February 17, 1970 meeting, however, Defendants again indicated that they would defer decision - the reason given was absence of one Defendant and fact that another left prior to conclusion, leaving only 5 present. On the morning of February 19, 1970 Plaintiff indicated to Defendant that he would commence preparation of paperwork necessary to institute federal suit. Before noon on that same morning Defendants had filed the Appeal from the order of the State Board of Education, which as finally concluded in Plaintiff's favor only this spring of 1976. The State Court Appeal was instituted with a nine page petition with seven additional pages of Exhibits attached, indicative of agility and lack of formality with which Defendants would and could then act if so inclined. While possibly conjecture that timing of Defendants action motiviated to delay pursuit of re-instatement by Plaintiff in Federal Court, it is certain that Plaintiff then proceeded to file in this Court with utmost speed possible. Eight days later on February 27, 1970 this suit was instituted, and the rest to date this Court can judicially notice. The

single thread of purpose running unbent through the difficulty is that *re-instatement is its single aspect not amendable to dilution* and that judicial resolution thereof had, necessarily, to await return to this Court. The dollars involved (as exemplified in earlier pleadings) have assumed their present importance only with passage of time and more recently. In all matters material Defendants' activities have been of unreasoning, obdurate and obstinate character.

16. On March 12, 1976, by failing to file motion for rehearing in the Supreme Court of Texas the Kerrville Independent School District foreclosed possibility of further appellate effort in the State Administrative proceeding and further activities of any kind *bearing on this controversy* other than in this court. No proceeding is now pending in any other Court with regard to the merits of this controversy. Two purely routine clerical matters remain in the Texas Court of Civil Appeals and they may be history on May 21, 1976.

17. No rule or understanding, oral or written, existed in the Kerrville Independent School District which proscribed beards on teachers, although the following rule did pertain to students:

> "Boys to be properly dressed for school must wear belts, have their hair cut frequently, and (be) cleanshaven if at the age of shaving."

To the present date, no formal rule or regulation proscribing beards on teachers has been promulgated by the Board of Trustees. Moreover, Mr. Ball was *not fired for violation of any "rule"*. Each of Defendants testified in October, 1974 that he or she was more concerned about Plaintiff's "insubordination" and "refusal to co-operate" with the Superintendent than with his physical appearance.

18. Three teachers at the Tivy High School wore mustaches at times material to this complaint. Another teacher has taught while wearing a beard on two separate occasions during the recent past without repercussion or distraction on either occasion. Plaintiff, however, was not permitted to commence teaching his first class while wearing his beard on September 2, 1969, and has not been allowed to teach thereafter.

19. Reason advanced by the Defendant Board as to why Plaintiff is not to be allowed to teach while wearing his beard is expressed concern that were he to do so it would become more difficult to enforce the rule that students be cleanshaven.

20. Plaintiff has expressed his desire to the school authorities that his contract be renewed for the 1970-71 year. In fact this lawsuit seeking re-instatement and other relief was *pending* prior to tender by Defendants of teaching contracts for that year. Plaintiff's contract was not renewed for that year when offers of renewal teaching contracts were tendered in March of 1970. Nor was Plaintiff offerred a renewal contract for the 1971-72 school year or for subsequent teaching years to date. He has been given no reason for such failure to renew his contract, although Defendants (and their successors) have been aware at all times that Plaintiff was seeking offer from them of a teaching contract. The failure of Defendants (and later of their successors in office) to offer Plaintiff a renewal contract for the year 1970-71 and for each of the succeeding years to date is due to Plaintiff's exercise

of freedoms guaranteed by the Constitution of the United States - to wit, the Guarantee of the Liberty provision of the Fourteenth Amendment which secures his right to teach with his Van Dyke beard under the facts and circumstances here. When persons acting under color of State Law *withhold a benefit* from a person because of his exercise of a constitutionally protected freedom, his exercise of such freedom is penalized no less than by taking away an *existing* benefit due to exercise of such freedom (as was the case with his 1969-70 teaching contract). Moreover, Defendants violated Plaintiff's right to procedural due process guaranteed by the Fourteenth Amendment by their failure to give him reasonable advance notice of intent not to offer him a renewal contract, and then, upon his request, an official statement of reasons therefor and a hearing thereon. While no teacher employed by the Kerrville Independent School District is formally tenured. Plaintiff has had at all times material the requisite *property* interest in re-employment implied contractually in the unwritten common Law of the Kerrville Independent School District, applicable to teachers of Plaintiff's past years of service and standing as chairman of a department. Further, while the non-renewal of Plaintiff's contract was not based upon charge of dishonesty or immorality (or any express reason at all) under the facts and circumstances here Plaintiff's interest in his good name, honor and integrity in his community was at stake in sufficient degree to activate the Liberty clause of the Fourteenth Amendment and create violation thereof when Defendants failed to give him reasonable notice of intent not to renew, and then Statement of reasons and hearing upon request. Plaintiff's standing in the community prior to Defendant's action of September 3, 1969 is exemplified by his then being adult sponsor of Key Club, an honorary Kiwanian, and Adult Sponsor of

Young Republicans of Kerr County as well as Chairman of his department at the school.

21. Under the facts and circumstances of this case, and particularly in view of the final or conclusive discretion legislatively committed in Texas to the State Board of Education in School matters such as here concerning the wearing of a Van Dyke beard by a teacher, *the burden would here be on Defendants to demonstrate no rational connection between this highest expression of opinion by those to whom ultimate discretion in such matters is relegated in Texas pertaining to efficient operation of the public schools.* In short, the same test of whether the action of the highest State officials who run education in Texas is to be branded as "arbitrary" already rejected by the State court. Even were this test exactly reversed - with the *burden on Plaintiff* to show no rational connection between *Defendant's* action and efficient operation of the schools it is alleged that on the facts and circumstances here *such burden could and would be sustained.* By any *objective* standard Defendants continuing actions herein complained of must be regarded, especially in view of their *continuing* nature, as done willfully and wantonly with a complete disregard of the rights of Plaintiff. Under the facts and circumstances here, Defendants could not find legal refuge even, if such be demonstrated, in sincere belief in doing right at all times. The facts and circumstances here are well beyond any point which can be legally excused by the best intentioned ignorance. As a direct result of Defendants actions here alleged Plaintiff has suffered actual damages in amount of $7,500.00. (separate and apart from back pay for subsequent teaching years deemed a part of the equitable remedy of re-instatement). Due to the willful and wanton character of defendants

actions herein alleged an additional award of $7,000.00 as exemplary damages ($1,000.00 as to each Defendant) is deemed appropriate.

22. Plaintiff actively sought and was not offered employment as a math teacher in the Kerrville Area during applicable times. He was unable to obtain such employment. On more than one occasion the reason given why he would not be considered for employment was the controversy with defendants. The significance of teaching to Plaintiff is borne out in the fact that he trained himself only for this and then stayed with it steadily in this single area and in this single school for six years (his entire working career after college) until his contract was terminated and then not renewed under facts and circumstances herein alleged. This court can judicially notice reasonable basis for Mr. Ball to have expected resolution of this difficulty, even by final judicial decision, within the next 12 to 16 months from any time since its inception. Only in retrospect can it now be known that the matter would be in limbo for so long. Nevertheless, Mr. Ball has made every reasonable effort to find similar employment within his area. All employment, with a single remotely possible exception, he has found in the Kerrville area has been such that beyond question it could have been accomplished *while performing as a teacher.* From the summer of 1971 until April 1975 he served as titular manager of the Hill Country Arts Foundation, a non-profit corporation located at Ingram, Texas. Plaintiff would expect to demonstrate to this Court that, especially in view of heavy summer season activity at Hill Country Arts Foundation when public school teachers have no teaching duties, that this position is also one he could have maintained while teaching. In April, 1975 Plaintiff moved from Kerrville, to accept a position

with the Buffalo Bill Historical Center at Cody, Wyoming. When compared with forced circumstance of other teachers as revealed in published cases of other teachers seeking judicial re-instatement, Plaintiff would respectfully venture to the Court that the unusual thing revealed in his personal history over these past displaced years is how long he did remain in the Kerrville Area. Under these circumstances reduction of back pay by interim earnings prior to April 1975, would be inappropriate as well as contrary to law. With regard to back pay Plaintiff would ask allowance *now* given to chairman of Department; allowance to bring his Teacher Retirement (still in effect in Austin) up to where it would be had none of this occurred; as well as interest, calculated monthly.

CAUSES OF ACTION

23. By terminating and failing to renew Plaintiff's teaching contract because of Plaintiff's refusal to accede to their demand that he shave his beard the Defendant Board violated Plaintiff's right to liberty under the Fourteenth Amendment.

24. By terminating and failing to renew Plaintiff's contract for the express reason that if Plaintiff were allowed to teach while wearing a beard, the rule that students must be cleanshaven would become more difficult to enforce, is violative of the equal protection of the laws provision of the Fourteenth Amendment in circumstances such as here, where other teachers are allowed to wear mustaches at the present time, and another teacher has taught while wearing a beard on two separate occasions in the recent past. Such a classification, which differentiates between beards and mustaches on teachers for the express purpose of render-

ing easier of enforcement a rule that students wear neither mustaches nor beards is unreasonable.

25. Plaintiff's Fourteenth Amendment right to procedural due process has been abridged by Defendants in the manner in which they terminated his contract and failed to renew his contract during subsequent years. This was done in a specially called session after a few hours' notice to plaintiff that such meeting would be held and that he could attend. No rule existed then nor does it now which requires that male adult teachers be cleanshaven. No Legislative type hearing has yet been called to specifically determine if such a rule should be promulgated and, if so, if such a radical sanction as discharge should be imposed for its violation. Nor was Plaintiff notified by the Defendants or their agents or employees in the spring of 1970 that his teaching contract would not be renewed for the 1970-71 School year or furnished reason or reasons therefor, or for any subsequent teaching year. Moreover, Plaintiff has requisite *property* interest in teaching contract for subsequent years.

26. Plaintiff is suffering and will continue to suffer irreparable injury by virtue of the acts, policies and practices of Defendants, as set forth above. Plaintiff has no plain, adequate or complete remedy at law to redress these violations of his federally protected rights, and this suit for injunction and other relief is his only means of securing complete and adequate relief. Back pay for each interim year, commencing with the year 1970-71, is a part of this equitable remedy of reinstatement.

27. Title 42, U.S.C.A., Section 1983 authorizes recovery of *damages* caused by persons acting under color of State

Law under facts and circumstances here. Plaintiff has suffered actual damages in amount of $7,500.00 to the actions of Defendants. Award of $7,000.00 exemplary damages is deemed appropriate.

PRAYER

WHEREFORE, PLAINTIFF prays that this Court:

1. Declare that Defendant Board cannot terminate Plaintiff's existing teaching contract for the 1969-70 school year or refuse to award him renewal contracts for subsequent years, on the ground that Plaintiff elects to wear a beard, trimmed neatly and washed and polished in such a manner as to constitute no possible hazard to health or prevent him from performing as a teacher under such contracts.

2. Grant Plaintiff a mandatory injunction ordering Defendants and their successors, their agents, servants and employees and all persons in active concert with them who obtain notice of the order, as follows:

> To immediately re-employ, or offer to re-employ, Plaintiff in the Kerrville School System in the same position be held at the time of his discharge if such position is available, or can be made available. Should such position not be available, Defendants are to consider Plaintiff's six years teaching experience in the mathematics department of the Tivy High School against the other teachers then in such department, to the extent it considers seniority in making such assignments and to make reassignments accordingly. Should such

position, even after the above has been accomplished, not become available, then Defendants are to objectively compare Plaintiff with *all* other teachers, first in Tivy High School and then in the entire school system. Should Plaintiff be found superior to *any*, he must be given such position and the least qualified teacher dismissed. Should vacancy for Plaintiff not be made available even after the above has been accomplished, then he is to be offered employment in *any* teaching vacancy which occurs for which he is qualified by certificate of experience, before such opportunity is offered to *any* new applicant. Plaintiff is to be notified forthwith of such reappointment and assignment and should such assignment be other than to the same position as chairman of the Mathematics Department of the Tivy High School which he held at the time of his discharge, Defendants shall within five (5) days from entry of this order, file herein their reasons for failing to make such assignment. The Court will scruntinize such reasons with care, to assure the Defendants have acted in good faith. Because of Defendants' prior action in terminating and failing to renew Plaintiff's teaching contract for constitutionally proscribed reasons, Defendants will carry the burden of Justifying their conduct by clear and convincing evidence. In any event Plaintiff is to be offered the *first available position which next becomes open in the Mathematics Department at Tivy High School should these stipulations not immediately create such opening and even if Plaintiff should have declined to accept other position*

in other department at High School or in other school in District. Jurisdiction of this matter is to be retained to insure compliance with the directions herein set forth so long as is necessary to completely eradicate any administrative action directly or indirectly related to the issued determined by the order.

3. Grant Plaintiff back pay computed as follows: an amount equal to and measured by the total salary which would have been earned by Plaintiff during each subsequent year, or part thereof, which may have elapsed at the time final determination is made to be computed at the same rate of pay as Plaintiff would have received had he been allowed to teach under such determination is made (for example, salary of the 1970-71 school year is to include the statutory raise given all teachers and the increment given for one years' additional experience), without reduction or allowance made for other moneys which may have been earned by Plaintiff during the 1970-71 school year, or subsequent year, or any part thereof, until April 1975, after which time reduction is appropriate for outside earnings, jointly and severally against defendants as individuals, but, in the alternative, against Defendants in their official capacities. Increment is to be added to compensate Plaintiff for position as chairman of department as well as to compensate him for loss to his teacher retirement.

4. Grant Plaintiff actual damages in amount of $7,000.00 and exemplary damages in amount of $7,500.00.

5. Award Plaintiff reasonable Attorney's Fees.

6. Allow Plaintiff his costs herein.

7. Award further relief as may appear to the Court to be equitable and just.

8. Retain jurisdiction to insure that the above has been accomplished.

Respectfully submitted

s/ Joe Mike Egan, Jr.

JOE MIKE EGAN, JR.
254 First National Bank Building
Kerrville, Texas 78028

Attorney for Plaintiff

NO. 78-1215

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

GENE BALL,
Petitioner

v.

BOARD OF TRUSTEES OF THE
KERRVILLE INDEPENDENT SCHOOL DISTRICT,
HENRY H. WIED, MARGARET WATSON,
DAN W. BACON, PAT BRADEN,
EARL A. COCHRANE, MAURICE HAUFLER
AND C. H. BORCHERS, MEMBERS OF THE
BOARD OF TRUSTEES, INDIVIDUALLY
AND IN THEIR OFFICIAL CAPACITIES,
Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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LIST OF AUTHORITIES

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Respondents

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondents, Board of Trustees of the Kerrville Independent School District, Henry H. Wied, Margaret Watson, Dan W. Bacon, Pat Braden, Earl A. Cochrane, Maurice Haufler and C. H. Borchers, members of the Board of Trustees, individually and in their official capacities, pray that the petition of petitioner, Gene Ball, that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit rendered in this case, be denied.

OPINIONS BELOW

The opinions below are correctly set forth in Appendix A, pages A-1 through A-12 inclusive, of Petitioner's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

JURISDICTION

Respondents do not contest jurisdiction of this Court.

QUESTIONS PRESENTED

Did the United States Court of Appeals for the Fifth Circuit err in affirming the judgment of the United States District Court in dismissing petitioner's (Gene Ball's) suit for reinstatement, said petitioner being an untenured high school teacher?

Respondents, hereinafter referred to as School District, are dissatisfied with petitioner's statement of the question presented.

STATEMENT OF FACTS

The School District has no disagreement with the synopsis of events occurring on the various dates as set forth in petitioner's petition for writ of certiorari, including all applicable orders and judgments set forth in Appendix A, B and C to his petition.

Although the School District does not disagree with the occurrence of such events, orders and judgments, the School District does not agree with the opinions, conclusions and arguments of petitioner's attorney which are interspersed throughout his Statement of Facts. For example, petitioner (Ball) takes the position that the sole reason his contract was terminated in September, 1969, and the sole reason he was not subsequently reinstated to his teaching position was because he refused to shave a beard.

The School District believes that the following facts are quite important.

It is undisputed that petitioner was a non-tenured teacher, employed under a one-year contract. It is also undisputed, and Ball so admits, that the former school trustees

acted in good faith. On page 4, lines 1-8 of Plaintiff's Exhibit F (Appendix pg. 196), petitioner's attorney states:

> Our position is that the Board has acted in good faith; that they have exercised their best judgment; that Mr. Barr in particular has exercised a professional judgment that Mr. Ball's beard, if he were allowed to teach with it would, in the sense of setting an example, make it more difficult to enforce a policy that the Kerrville Independent School District has that male students who are old enough to shave be clean shaven.

The Court of Civil Appeals of Texas, San Antonio, in the opinion written by Chief Justice Barrow in Ball v. Kerrville Independent School District, 529 S.W.2d 792 (Tex. Civ. App.-1975, San Antonio, error ref'd n.r.e.) at page 794, found that:

> Each of the trustees testified that he or she was more concerned about Ball's insubordination and refusal to cooperate with the superintendent rather than Ball's physical appearance.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I

Petitioner alleges seven (7) reasons why this Court should grant a writ of certiorari.

Petitioner asserts that the finding of the United States Court of Appeals for the Fifth Circuit that Mr. Ball failed to raise a substantial federal question conflicts directly with: First, this Court's decision in Kelley v. Johnson, 425 U. S. 238 (1976); Second, two recent decisions of the Fifth Circuit, Lansdale v. Tyler Junior College, 470 F.2d 659 (5th Cir. 1972 en banc) cert denied 411 U.S. 986 and Hander v. San Jacinto Junior College, 519 F.2d 273 (5th Cir. 1975); and Third, three more of this Court's decisions, namely Perry v. Sindermann,

408 U.S. 593 (1972), Board of Regents of State Colleges v. Roth, 408 U.S. 564 and Paul v. Davis, 424 U.S. 693 (1976).

Since petitioner's first three reasons for granting the writ are aimed at the Fifth Circuit Court's finding that Mr. Ball failed to raise a substantial federal question, the School District will respond to all said first three reasons together, for the sake of convenience and brevity.

In sustaining the U.S. District Court's dismissal of petitioner's suit, the Fifth Circuit found that Mr. Ball failed to raise a substantial federal question. The Fifth Circuit also found that petitioner's claim of a violation of a liberty interest under the record of this case was wholly unsubstantiated and frivolous.

The Fifth Circuit found that the two-pronged test of determining whether the federal question involved was wholly insubstantial and frivolous had been fully met, and affirmed the dismissal of the district court.

The two-pronged test is set forth in Southpark Square Ltd. v. City of Jackson, Miss., 565 F.2d 338 (5th Cir. 1978) at page at page 342, as follows:

> [L]ack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of [the Supreme Court] as to foreclose the subject.
> Mays v. Kirk, 414 F.2d 131, 135 (5th Cir. 1969), quoting from California Water Service Co. v. City of Redding, 304 U.S. 252, 58 S.Ct. 865, 867, 82 L.Ed. 1323 (1938).

The employment of Mr. Ball, an untenured high school teached employed under a one-year contract at Tivy High School, was terminated by the School District. Petitioner asserted the reason for termination was his refusal to shave his beard.

Based on the previous decisions of this Court, the Fifth Circuit correctly held that reemployment could be refused, for any reason, or for no reason at all, and, therefore, having no right to reemployment he had no due process right to a hearing

as to the reasons for dismissal.

In Kelley v. Johnson, 425 U.S. 238, 47 L.Ed.2d. 708 96 S.Ct. 1440 (1976) this Court held the hair grooming regulation for county policemen did not violate their Fourteenth Amendment rights. In fact, this Court also upheld the District Court's original judgment of dismissing plaintiff's suit.

In the annotation following the reported decision of Kelley v. Johnson, supra, this Court's views as to concept of a 'liberty' under the due process clauses of the Fifth and Fourteenth Amendments are discussed in 47 L.Ed. 2d 975. From page 996 a portion of such discussion of two of the cases which petitioner says are in conflict with the opinion of the Fifth Circuit are set forth as follows:

> On the other hand, as also held by the Supreme Court, it would stretch the concept of procedural due process too far to suggest that a person is deprived of 'liberty' when he simply is not retained in one job but remains as free as before to seek another. Board of Regents v. Roth (1972) 408 US 564, 33 L.Ed. 2d 548, 92 S. Ct. 2701; Bishop v. Wood (1976, US) 48 L Ed 2d 684, 96 S. Ct. 2074.
>
> The rule last stated is illustrated by the following cases.
>
> A nontenured state university professor who was employed for one year and then was given no reason for his nonretention was held, in Board of Regents v. Roth (1972) 408 US 564, 33 L Ed 2d 548, 92 S Ct 2701, to have no Fourteenth Amendment liberty right entitling him under the due process clause to a statement of reasons for his nonretention and a hearing on the university's decision not to rehire him. Insofar as the professor's interest in 'liberty' was concerned, the court pointed out that he was in no way deprived of such interest, since in declining to re-employ him, the state did not impose on him any stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The court also stated that mere proof that a person's record of

> nonretention by a state or state agency in one job might make that person somewhat less attractive to some other employers does not, taken alone, establish the kind of foreclosure of opportunities that amounts to a deprivation of 'liberty' proscribed by the due process clause of the Fourteenth Amendment. Without discussing questions of liberty, Burger, Ch. J., concurred in the judgment, and Douglas, J., dissented. Marshall, J., also dissented, on the ground, among others, that every citizen who applies for a government job is entitled to it unless the government can establish some reason for denying the employment, and that this 'is also liberty--liberty to work,' which is the very essence of the personal freedom and opportunity secured by the Fourteenth Amendment.
>
> Likewise, in Perry v. Sindermann (1972) 408 US 593, 33 L Ed 2d 570, 92 S Ct 2694, the court ruled that the mere showing that a nontenured professor was not rehired in one particular job, without more, did not amount to a showing of a loss of liberty (or property).

Neither Lansdale v. Tyler Junior College, supra, nor Hander v. San Jacinto Junior College, supra, are factually similar to the facts in this case and both were decided before Kelley v. Johnson, supra.

Paul v. Davis, supra, is clearly instructive that petitioner does not have a cause of action against the School District. The plaintiff in the Paul v. Davis Case, supra, was arrested for shoplifting. His name and picture were included in a police flyer of active shoplifters and distributed to merchants. The shoplifting charges were dismissed and plaintiff brought suit alleging his defamation deprived him of liberty protected by the due process clause of the Fourteenth Amendment. The district court dismissed the complaint, and this Court in effect affirmed such dismissal. Mr. Ball's allegations in this case are far removed from any link to a badge of infamy or public scorn. A person's choice to wear or not to wear a beard has no effect on his

ability to earn a livelihood. Mr. Ball was paid every cent, together with interest thereon, due to him as his 1969-1970 employment contract.

II

The School District respectfully responds collectively to petitioner's reasons numbers 4 and 5, and for such response would show this Court that all of the members of the Fifth Circuit Court agree that the district court acted correctly in dismissing the action in question. Different reasoning was used, but the result was the same.

Circuit Judge Godbold in his concurring opinion stated that:

> Ball's claims have been vindicated in state court to the extent they are not patently illusory. (page 1103, unpublished opinion of Fifth Circuit Court in Ball v. Board of Trustees of Kerrville Independent School District, 1978)

It also should be noted that in the Court's opinion in the said Ball Case, supra, at page 1102, the court said:

> State administrative procedures resulted in Ball's being paid his salary in full for the term of his employment. No other or further redress at the hands of the Board of Trustees or its individual members may be had under 42 U.S.C. Sec. 1983, or under any accepted concept of federal constitutional rights.

The decisions of this Court are conclusive of the issues in this case, and the conclusion reached by the Fifth Circuit is in full accord with this Court's decision regardless of the path of reasoning used.

III

Petitioner's reasons numbers 6 and 7 primarily beg the question and are merely extension of the central issue in this case which petitioner is trying to disprove, mainly that Mr. Ball

has not demonstrated that he has any federally protected right which has been violated. It is respectfully submitted that petitioner has failed to raise a substantial federal question.

Ball never made any effort to assert, in any state administrative tribunal or any state court, his claim of right to reinstatement or re-employment either under state law 'in light of' or against the background of a federal constitutional claim.

Ball's Fifth Amended Answer and Cross-Action (Appendix pg. 189) is his final pleading upon which he went to trial on the merits in the state administrative proceeding. A reading of the pleading shows that he deliberately withheld from the state court all consideration on the question of state law concerning reinstatement and re-employment.

A reading of the pleading also shows that the only remedy sought by Ball was payment of salary (money damages) remaining unpaid under his teaching contract for the year 1969-70, together with interest thereon and costs of court, and for a writ of mandamus to compel the school district to pay the same if not duly paid. The only law invoked by Ball was the Texas law that the case be governed by the Texas substantial evidence rule.

Based on the Texas substantial evidence rule, Ball won his appeal, as shown in the reported opinions of Ball v. Kerrville Independent School District, 529 S.W.2d 792 (Tex.Civ. App.-1975, San Antonio, error ref'd n.r.e.). Ball recovered all he asked for, i.e. remaining salary due under the 1969-70 contract, together with interest and costs of court. As Ball put it in his brief, he has been paid down to the last penny all moneys due him under such final judgment.

Ball is asking this Court to speculate with him that he would have been wholly unsuccessful in a Texas state proceeding if he had asked for or claimed any relief or remedy for reinstatement or re-employment even 'in light of' his federal constitutional claims. Ball is asking this Court to judge a judgment that never occurred and never could have occurred because Ball deliberately withheld those claims of reinstatement so as to actually prevent a determination of his claim of reinstatement on the question of state law 'in light of' any federal constitutional claims.

It is undisputed that Ball urged his federal claims during the proceedings before the Texas State Commissioner of Education and the Texas State Board of Education. (See page 794, Ball v. Kerrville Independent School District, 529 S.W.2d 792, supra.)

After the order of June 5, 1970, from the federal district court, Ball intentionally withdrew and withheld his federal claims from consideration in all future state proceedings.

The United States District Court in its Order to Show Cause, May 13, 1970 (Appendix pg. 53) pointed out that the course being pursued by Ball in the state court was contrary to the spirit, if not the letter, of the district court's prior order which contemplated a good faith attempt on the part of Ball of complete the proceedings in state court in an adversary manner.

Ball's representation of his intention not to exhaust his administrative remedies was noted in the district court's Order of Dismissal of June 5, 1970.

Touching only the question of reinstatement by Ball for any year beginning in the school year 1970-71 and each year thereafter, it should be pointed out that there is no record that Ball ever applied for reinstatement and no record of his perfecting any appeal to any authority as a result of being denied reinstatement covering a period of time of some seven (7) years.

The only thing appearing in Ball's brief concerning any appearance before the Board of Trustees is when he said Ball appeared on January 15, 1970 and on February 17, 1970, and that no action was taken at either of these meetings. Ball never perfected any appeal from those two meetings, should he contend that he sought re-employment at those meetings for the coming school year.

In Randell v. Newark Housing Authority, 384 F.2d 151 (3rd Cir. 1967), certiorari denied 383 U.S. 870, 89 S.Ct. 158, 21 L.Ed.2d 138, at page 156, the court said:

> A party cannot refuse to make any use of a system of 'administrative' and 'judicial' relief clearly open to him and thus create a record on which a Federal Court can decide that the party has been denied due process, or that due process safeguards are lacking.

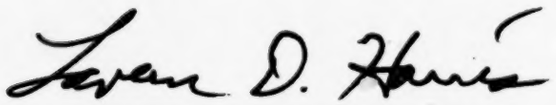
It is pointed out in the court's note 11 at page 156, that the court's decision was not based on the rational of exhaustion of state remedies.

As shown in Lovely v. Laliberte, 498 F.2d 1261 (1st Cir. 1974), res judicata, even in contest of federal civil rights statute, bars all grounds that might have been, but were not presented to a state court.

CONCLUSION

From the foregoing statement of facts and authorities, the respondents (School District) pray and request this Honorable Court to in all things deny the petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, and for such other and further relief that respondents (School District) may be entitled.

Respectfully Submitted,



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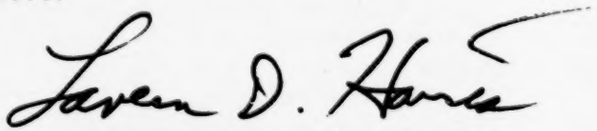
Attorneys for Respondents

CERTIFICATE OF SERVICE

I certify that before mailing the foregoing instrument, Respondents' Brief in Opposition to Petitioner's Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, for filing, that I personally mailed to Joe Mike Egan, Jr., 254 First National Bank Building, Kerrville, Texas 78028, counsel for petitioner, three copies thereof in accordance with Rule 33 of the Rules of the Supreme Court, on the 2nd day of March, 1979.



Lavern D. Harris

In the
Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-1215

GENE BALL,

Petitioner

versus

BOARD OF TRUSTEES OF THE KERRVILLE INDEPENDENT SCHOOL DISTRICT, HENRY H. WIED, MARGARET WATSON, DAN W. BACON, PAT BRADEN, EARL A. COCKRANE, MAURICE HAUFLER AND C. H. BORCHERS, MEMBERS OF THE BOARD OF TRUSTEES, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES,

Respondents

REPLY BRIEF
LETTER RESPONSE TO RESPONDENTS BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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On pages 2 and 3 of Respondent's brief in opposition to petition for writ of certiorari Respondents (erroneously) assert that "It is also undisputed, and Ball so admits, that the former school trustees acted in good faith." Respondent's then cite the following from the hearing had November 19, 1969 before the Commissioner of Education of the State of Texas:

> "Our position is that the Board has acted in good faith; that they have exercised their best judgment; that Mr. Barr in particular has exercised a profes-

sional judgment that Mr. Ball's beard, if he were allowed to teach with it would, in the sense of setting an example, make it more difficult to enforce a policy that the Kerrville Independent School District has that male students who are old enough to shave be clean shaven."

(Appendix to brief in U.S. Court of Appeals, page 196)

The above lines are lifted out of context from the opening statement of Mr. Ball's attorney at the November 1969 hearing before the Commissioner of Education. Mr. Ball would respectfully request that the Court read the *entire* opening statement and, particularly, the first full paragraph commencing on page 5. (pages 3, 4, 5, pl's exhibit F to record in Court of Appeals, below). In this context the Court can see for itself that even prior to commencement of the first administrative hearing, Mr. Ball did *not equate good faith in the sense of apparent good intentions with the exercise of a reasonable discretion.* Not even, however, in the loose sense of "good intentions" or absence of specific malice can there be found basis for respondents' remark about *good faith* being an *undisputed* issue of the case. (Respondents' Brief, pages 3 & 4).

Included in relief sought by Mr. Ball in his Section 1983 action filed in U. S. District on February 19, 1970 (exactly three months after the hearing before the Commissioner) was a plea that *exemplary damages* be assessed against these same respondents. As to the present status of this "undisputed" issue, Mr. Ball would respectfully refer the Court to his like plea for *exemplary* damages on page 14 of his Third

Amended Complaint (A-39, Appendix). The factual basis for this plea that exemplary damages be assessed is alleged in paragraph 21 on page 9 of Plaintiffs' Third Amended Complaint (Appendix Page A-39).

In its significant *Legal* sense, *good faith*, its meaning and its presence or absence, is a matter which must be determined by the trial court. Good faith, perhaps, can only be demonstrated by a *successful defense on the merits.* cf. *McLaughlin v. Tilendus*, 398 F 2d 287 (7th Cir-1968) at 290, 291. Moreover, it is alleged that unreasonably obstinate and obdurate conduct of respondents not only caused *this* lawsuit to be filed, but also their own state court proceeding and its perpetuation, See: paragraph 15, Plaintiff's Third Amended Complaint, Appendix pages - A-34,35 and 36. cf. *Horton v. Lawrence County Board of Education*, 449 F 2d 793 (5th Cir. - 1971).

Respectfully submitted,

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Kerrville, Texas 78028

Attorney for Petitioner

CERTIFICATE OF SERVICE

I certify that I have this 7th day of March, 1979 served three copies of this letter response to Respondent's brief on Lavern D. Harris, Realty and Trust Building, Kerrville, Texas, Attorney for Respondents.

s/ Joe M. Egan, Jr.
JOE MIKE EGAN, JR.